(1)

No. 00-6933-CFH Title: Remon Lee, Petitioner
v.
Mike Kemna, Superintendent, Crossroads Correctional Center

Docketed:
November 7, 2000 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Nov 3 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 7, 2000)
	Nov 20 2000	Waiver of right of respondent Mike Kemna, Superintendent to respond filed.
	Nov 30 2000	DISTRIBUTED for Conference of January 5, 2001
	Dec 8 2000	Response requested.
	Jan 5 2001	Brief of respondent Mike Kemna, Superintendent in opposition filed.
	Jan 12 2001	Reply brief of petitioner Remon Lee filed.
	Jan 18 2001	REDISTRIBUTED for Conference of February 16, 2001
	Feb 20 2001	REDISTRIBUTED for Conference of February 23, 2001
	Feb 26 2001	Petition GRANTED. SET FOR ARGUMENT October 29, 2001. **********
	Mar 6 2001	Motion of petitioner for appointment of counsel filed.
	Mar 14 2001	Motion DISTRIBUTED. March 30, 2001 (page 4)
	Apr 2 2001	Motion for appointment of counsel GRANTED and it is ordered that Bonnie I. Robin-Vergeer, Esq., of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
	Apr 4 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including May 11, 2001.
	May 1 2001	Joint appendix filed.
	May 11 2001	Brief of petitioner Remon Lee filed.
	May 18 2001	Order extending time to file respondent's brief on the merits to and including July 13, 2001.
	Jul 11 2001	Brief of respondent Mike Kemna, Superintendent filed.
	Jul 12 2001	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Jul 13 2001	Brief amici curiae of Nebraska, et al. filed.
	Aug 14 2001	CIRCULATED.
	Aug 15 2001	Reply brief of petitioner Remon Lee filed.
	Sep 4 2001	Record filed.
	Sep 6 2001	Record filed.
	Oct 29 2001	ARGUED.

1 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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Supreme Court, U.S.
NOV 2000
CLERK

No. 00-6933 3

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

REMON LEE, — PETITIONER
(Your Name)

vs.

MIKE KEMNA, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

REMON LEE
(Your Name)

1115 EAST PENCE ROAD
(Address)

CAMERON, MISSOURI 64429-8804
(City, State, Zip Code)

N/A
(Phone Number)

60 pp

QUESTION(S) PRESENTED

1) DID THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERR BY AFFIRMING THE DISTRICT COURT"S DENIAL OF LEE'S PETITION FOR HABEAS CORPUS BECAUSE HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO GRANT HIM A 19 HOUR CONTINUANCE TO CONTACT HIS THREE SUBPOENAED ALIBI WITNESSES WHO UNEXPECTEDLY DID NOT RETURN AFTER A LUNCH BREAK?

2) SHOULD A HEARING HAVE BEEN HELD ON THE HABEAS CORPUS TO AT LEAST CONSIDER THE TESTIMONY OF THE ALIBI WITNESSES TO THE EFFECT THAT THEY WERE TOLD BY A COURT PERSONNEL, TO LEAVE?

3) IN THE CIRCUMSTANCES IN REMON LEE'S CASE, WAS HIS FEDERAL VIOLATION REGARDING A DENIED REQUEST FOR A SHORT CONTINUANCE, PROCEDURALLY BARRED FROM FEDERAL COURT?

4) HAS REMON LEE MADE A SUBSTANTIAL SHOWING OF ACTUAL INNOCENCE ACCORDING TO THE **SCHLUP** STANDARD FOR HIS ALIBI WITNESSES TO BE EXPLORED FURTHER TO PREVENT A FUNDAMENTAL MISCARRIAGE OF JUSTICE?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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RULES

MISSOURI RULE 24.09 09

MISSOURI RULE 24.10 09

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 25, 2000

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 8, 2000, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[X] reported at 213 F.3d 1037 (8th Cir. 2000); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution reads in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime....[and] be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment of the United States Constitution reads in relevant part:

> No State shall....deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The testimony presented at Mr. Lee's state court trial was as follows: On the afternoon of August 27, 1992, Reginald Williams (age 18), and his friend William Sanders (age 15), were trying to start a moped in a yard, between 67th and 68th Street on Monroe, in Kansas City, Missouri. While they were there, an older model rusty orange (or red) and white truck drove up the street and went south on Monroe. The driver was the only person in the truck.

The truck pulled into a driveway and turned around. The truck drove very slowly back down the street, headed north. As the truck went north, it passed Williams and Sanders again The driver stared at Sanders and Williams for about two to ten seconds.

The truck parked on Monroe and stayed there for about 30 minutes. Eventually, a blue 1965 Chevy Nova came around the corner. The car stopped directly across from the truck. Utimately, someone fired six or seven shots into the driver's side of the blue car and ran behind the red truck and jumped in the passenger side of the truck. After the passenger got in, the truck sped off, leaving tire tracks in the street.

Steve Shelby, the driver of the blue Nova, died of penetrating injuries to the brain caused by gunshot wounds Seven bullets and nine shell casings recovered from the scene were all fired from the same .9 millimeter caliber semi-automatic weapon. No gun was ever recovered.

Later that day, Williams picked Petitioner Lee's photograph out of a photo lineup and identified him as looking like the driver of the truck, although he wanted to see the individual in person before he could be certain. Williams later identified Lee as the driver after viewing two videotaped lineups. Williams could not identify anyone as **the shooter**. Williams could only see the driver from the shoulders up and could not identify any distinguishing characteristics of the driver. Williams admitted that he **lied** to the people investigating this case. He also told Petitioner Lee's first defense counsel in a taped statement that Reggie Rhodes was **the driver**. Williams further stated on tape that he just agreed to whatever his friend said when giving a report to the police.

William Sanders, (age 15 at the time), also viewed a photo lineup on August 27, 1992. Prior to trial, Sanders made "no" identification of Mr. Lee or anyone else as the driver of the truck and said on direct examination that he was not "ever" able to identify the driver. On cross-examination however, Sanders claimed he could identify Mr. Lee as the driver.

Shelby's sister, Rhonda Shelby, said she saw Mr. Lee and Reginald Rhodes together near a red truck behind her duplex, at 6621 Askew, in Kansas City, around 8:00 p.m on August 26, 1992 She did not speak to the person she claimed was Mr. Lee. Later that night, Reginald Rhodes asked Rhonda about her brother.

Lynn Bryant lived at 6623 Askew on August 26, 1992 Bryant said she saw Mr. Lee and Rhodes outside her duplex on the evening of August 26, 1992. She said the person she thought was

Mr. Lee had an old orange truck and Rhodes asked Bryant if she had seen Shelby.

Petitioner Lee's prior counsel, Mr. Robert Calbi, and Mr. Calbi's investigator Fred Macon, testified on Mr. Lee's behalf that Reginald Williams gave Calbi a statement on April 23, 1993, in which Williams admitted he could not see the driver of the car well enough to identify him. Mr. Calbi also testified he gave Williams a lineup with Petitioner Lee's photograph in it and Williams could not identify Mr. Lee. Following Mr. Calbi's testimony, the court adjourned for the lunch break.

When the proceedings resumed following the noon break on February 24, 1994, defense counsel put Petitioner Lee on the witness stand to make a record regarding his right to testify. In the course of the questioning, counsel developed the fact that Mr. Lee's mother Gladys Edwards, his stepfather James Edwards, and sister Laura Lee, had come from the state of California to testify for Mr. Lee. Defense counsel had met with these witnesses on February 21, 1994 and had served each of them with a subpoena. Defense counsel assured the jury in opening statement, that these witnesses would testify Mr. Lee was in California at the time of the murder. Ms. Laura Lee and Mr. and Mrs. Edwards were at the courthouse from 8:30 until about 11:00 a.m., on February 24, 1994. All three of them left the courthouse at 11:00 and had not returned to the courthouse when the proceedings started after the lunch break. Mr. Lee and defense counsel did not know at that time why they had left. Although counsel claimed there was nothing he could do.

Petitioner Lee asked him to request a continuance for "a couple hours" to try and locate the witnesses. Mr. Lee told counsel he knew his parents had not returned to California because they had a religious activity planned that evening in Kansas.

Defense counsel moved for a continuance until the next morning, at Mr. Lee's request. Although the alibi witnesses were his sister, mother and stepfather, who had voluntarily come all the way from California to testify for Mr. Lee, the trial judge denied the continuance motion. In overruling the motion, the judge assumed Mr. Lee's family members had "abandoned" him In response to defense counsel's request to adjourn until the next morning, the court stated, "My daughter is going to be in the hospital all day....So I've got to stay with her....it's too bad. The Court will not be able to be here tomorrow to try the case." Defense counsel also asked if the case could be continued until the next Monday in light of the judge's personal commitment. The judge denied that request also, stating that he had another trial starting on Monday. Mr. Lee was able to call no further witnesses.

Mr. Lee later learned that his alibi witnesses had been told by an officer that their testimony would not be needed until the next day because the state's case would take up the remainder of the day (See affidavits Laura Lee, Gladys Edwards, and James Edwards, included).

The trial judge overruled Petitioner Lee's motions for judgment of acquittal at the close of the state's, and all the evidence. The jury found Mr. Lee guilty of Murder in the first

degree and Armed Criminal Action. On April 19, 1994, Senior Judge Anthony P. Nugent sentenced Petitioner Lee to concurrent terms of life without parole on the murder charge and thirty years on the other charge.

On November 21, 1994, Mr. Lee filed a timely pro se motion for postconviction relief pursuant to Missouri Supreme Court Rule 29.15. This motion was amended by appointed postconviction counsel, who also requested an evidentiary hearing. Mr. Lee's motions brought forth that he received ineffective assistance of trial counsel and was denied Due Process of Law (1) when trial counsel failed to call his co-defendant Reginald Rhodes to testify on his behalf at trial, and (2) when the trial court overruled his motion for continuance after Mr. Lee's alibi witnesses mysteriously did not return to the courthouse before they could be called to testify. The Rule 29.15 motion set forth the names of the three alibi witnesses and stated what their testimony would be. On August 21, 1995, Judge Thomas C. Clark overruled Mr. Lee's 29.15 motion without an evidentiary hearing. Petitioner Lee filed a timely notice of appeal.

The state appellate court, in denying any relief held that Mr. Lee failed to comply with Missouri Supreme Court Rule 24.09 which requires that motions for continuances be in "writing" and the trial court could have properly denied the Motion for Continuance on that basis. The state appellate court also held that Petitioner Lee failed to present the elements required by Missouri Rule 24.10, when a continuance is requested on the basis of an absent witness. The Missouri Court of Appeals went on to

rule on the merits of the continuance request and found that Mr. Lee could not show that the testimony of the absent witnesses was was so crucial that it is reasonably probable that a different outcome would have resulted and so prejudice was not shown.

Mr. Lee filed a habeas corpus petition under 28 U.S.C. 2254 alleging several errors including the Due Process violation for failing to grant the continuance. The United States District Court for the Eastern District of Missouri denied relief on the habeas petition holding Mr. Lee's claim procedurally defaulted with no showing of prejudice. The United States Court of Appeals for the Eighth Circuit granted a certificate of appealability on the trial court's denial of a continuance, and after briefs and oral argument, a majority of the panel affirmed the District Court's denial of the issue. United States District Chief Judge in Iowa, sitting by designation, gave a **19 page** dissent. The total opinion was 22 pages in length.

The Petitioner Remon Lee now petitions this Court to grant a Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

The U.S. Court of Appeals affirmed the District Court's denial of habeas corpus relief, however, one member of the panel gave a 19 page dissent (See Appendix A).

The Court held that the Missouri appeals court "rejected Lee's claim because his motion for continuance did not comply "with Rules 24.09 and 24.10 "and thus the claim was procedurally barred." (Appendix A, pg. 2). The Court further opined that Lee could not overcome the default and that he could not prove his innocence (Id., at pg. 3).

Missouri courts do deny motions for continuances because they fail to meet the standards of Missouri Rules 24.09 and 24.10 (See Appendix A, pgs. 10-11, for case cites). However, the cases decided thus far in Missouri have different circumstances than Mr. Lee's case. Missouri courts have yet to decide on whether a defendant must meet the stringent requirements of Rules 24.09 and 24.10 when alibi witnesses "mysteriously" disappear for no logical reason. Not one case decided thus far has dealt with the "sudden" or "unexplained absence" of a witness. In fact, the court in State v. McCarter, 820 S.w.2d at 589 noted that the denial of a continuance is proper "particularly [] where the factual basis for the motion was not a last minute or unexpected surprise." It hints that such a situation could excuse a failure to comply or relax compliance with the written requirements of Rules 24.09 and the contents of Rule 24.10.

It should be strongly noted that neither the trial prosecutor, the trial judge, the postconviction court, nor the attorney general on appeal, even hinted that Mr. Lee had failed to comply with any procedure or rule in light of the circumstances of the case. The state appeals court appears to have pulled their reason for denying relief (failure to comply with Rules 24.09 and 24.10) out of a hat. To suggest that the trial court "could" have denied Lee's continuance other than for the reasons the judge gave on the trial record was to totally disregard the circumstances of Lee's particular case. The judge's reasons for denying the continuance were:

> 1) he decided (without a trace of evidence) that Lee's witnesses "abandoned" him;
>
> 2) he refused to have court the next day because his daughter would be in the hospital; and,
>
> 3) he refused to hold over the trial until the following Monday because of another case slated for for that week.

These are the reasons the judge denied Lee's motion for continuance, not because of a failure to comply with any rules of court.

The state appeals court did not explain "how" Lee failed to meet the requirements of Rule 24.09 and 24.10. State v. Lee, No. WD 49456, Slip Op. at 5, Memorandum.

The panel decision by the U.S. Court of Appeals to deny relief goes against the grain of the very reason why the Court issued a Certificate of Appealability (Appendix E, "whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance"). The District

Court denied relief also because of Lee's alleged failure to fulfill Rule 24.09 and 24.10. The U.S. Court of Appeals knew in full, of the District Court's decision. They had the case files when they granted the appealability. If Lee's claim truly was barred from consideration in the federal courts and Lee could not overcome the bar, there was no real reason to grant an appeal, with the appointment of private counsel, Ms. E. Ann Wright, The Cox Law Firm, 1125 Grand Ave., Kansas City, MO 64106.

The panel decision also conflicts with other Eighth Circuit decisions, namely;

White v. Bowersox, 206 F.3d 776 (8th Cir. 2000) (holding that state procedural rules are not adequate to bar federal habeas claims when they are neither firmly established or readily ascertainable).

Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994) (holding that the failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court).

Weeks v. Bowersox, 106 F.3d 248 (8th Cir. 1997) (holding, the Petitioner's assertion "that he can produce evidence of his actual innocence that, if credited, would lift the procedural bar, the magistrate judge erred by denying [Petitioner's] petition without a hearing on his actual innocence claim").

Sloan v. Delo, 54 F.3d 1371, 1379 (8th Cir. 1995) cert. denied sub. nom., Sloan v. Bowersox, 516 U.S. 1056 (1996), (holding, that a state procedural rule is not an adequate and independent state law ground if it would "thwar[t] the assertion of federal rights").

Both the District Court and the Eighth Circuit's opinion overlooks precedent by this Court regarding procedural bar:

Ylst v. Nunnemaker, 501 U.S. 797 (1991) (holding, that if "the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review").

Davis v. Wechsler, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923) (holding, whatever requirements "the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice").

Both the District Court and the Eighth Circuit's opinion conflicts with other Circuit Courts of Appeal:

Smart v. Scully, 787 F.3d 816, 820 (2nd Cir. 1986) (holding that a state appellate court's application of the contemperaneous objection rule did not preclude habeas corpus review).

Christoffel v. United States, 190 F.2d 585, 594 (D.C. Cir. 1950). (Strict adherence to state procedural rule was "so lacking in fundamental fairness as to constitute a miscarriage of justice which should not be permitted to occur"; quoted by U.S. ex rel. Smith v. DiBella, 314 F. Supp. 446, 447 (E.D.N.Y. 1999).

Thus, this issue is debatable among reasonable jurists of other courts and jurisdictions as well as the very same Circuit which denied Mr. Lee's habeas writ.

The Petitioner's federally protected Constitutional rights to Due Process of Law has been violated in such a way that it rendered the entire state trial proceedings fundamentally unfair.

Mr. Lee contends that due to the circumstances in his case, (1) there is no procedural default barring federal habeas review of his continuance issue, (2) if there were a default, it is excusable because Lee did everything a Petitioner could do in state count to present his federal violation for the courts' review, and, (3) the alleged default would be excusable due to his actual innocence of the crime convicted of, pursuant to Schlup v. Delo.

And lastly, but certainly not least, this Court should

grant Certiorari because the U.S. Court of Appeals for the Eighth Circuit has established a different standard for showing actual innocence that is in direct conflict with this Court's holding in Schlup v. Delo, 115 S.Ct. ___ (1995). Specifically, the Eighth Circuit has stood on its own post-Schlup precedent holding that federal courts cannot consider "new evidence" of actual innocence presented by a petitioner if that evidence was available at the time of trial and could have been discovered through the exercise of due diligence. See Meadows v. Delo, 99 F.3d 280 (8th Cir. 1996). In denying the present Petitioner Remon Lee's claim, the majority of the panel on the Eighth Circuit held:

> Lee has failed to make the required showing because the factual basis for the affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier.

(Appendix A, pg. 3). The United States District Court for the Eastern District of Missouri dealt with this erroneous standard by the Eighth Circuit when it granted habeas relief to Ellen Reasonover, a much publicized case, in Reasonover v. Washington, ___ F. Supp.2d ___ (E.D. Mo., August 1999). In a carefully drafted discussion, the Court pointed out that the Eighth Circuit's understanding of "new evidence" was in conflict with the Supreme Court's definition in Schlup v. Delo. It duly noted that the Supreme Court held that federal habeas courts should consider all of the evidence presented by a petitioner, not just evidence that was unavailable at the time of the trial.

The Eighth Circuit panel went on to say that even if Lee's

alibi testimony was new evidence, he "did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi." (Appendix A, pg. 3).

The Eighth Circuit's decision is wrong. Regarding whether the jury would have believed the Petitioner's witnesses over the state's witnesses, the Court of Appeals mistakes the state's case as a strong one, when in fact is was reasonably weak. At trial, one witness first testified to the prosecuting attorney and then defense counsel that he could "not" identify the Petitioner Remon Lee. Minutes later, he suddenly told the judge he could. Another witness admitted he "lied" when giving information about the case. The sister of the victim and her friend who testified Mr. Lee was in town the night before the crime, had limited visibility to the person they "said" was Lee. These are the "four prosecution witnesses" that according to the Court of Appeals, "refuted the alibi". Their testimony was only boosted by the fact that Mr. Lee's alibi witnesses weren't heard by the jury, as promised by defense counsel in opening statement. Under the circumstances, it is no surprise that the jury sided with the state in finding guilt beyond a reasonable doubt.

Had the jury heard the alibi testimony, given the shaky nature of the state witnesses' testimony, it is reasonable to believe that the jury would have acquitted Remon Lee. The full strength of the alibi witnesses has never been sought out.

The state postconviction court refused to grant a hearing so that the witnesses could be brought in for the court to measure their testimony according to law. Both the District Court and the U.S. Court of Appeals assumed without finding out, that Remon Lee's alibi witnesses would not be believed by the jury.

The Petitioner briefly notes that if the courts thus far have assumed that family members cannot give a believable alibi, then something is wrong with that reasoning. It creates the question: "who" then does make a good alibi witness? If someone goes to a public place and it is later discovered he needs an alibi for that period of time, no one may remember him. If he or she is with a friend, it could always be said that the friend would lie to save a friend. That brings one back to family members. The Petitioner submits that for a court to reject alibi witnesses because they are family members is not giving reasonable jurors the credit they rightly deserve.

Mr. Lee further submits that even under the strict standard set by the U.S. Court of Appeals, he could "not" have presented the alibi testimony earlier. Due to circumstances beyond his control, Mr. Lee could not have presented the witnesses to the jury. He was not allowed to bring them to a postconviction hearing even though the court was fully aware of the witnesses and what they would say and that they wanted to testify. The state appeals court denied Mr. Lee's appeal without his alibi witnesses' testimony having been tested in court. And finally, the District Court and the U.S. Court of Appeals rejected the "actual innocence" of Remon Lee without putting his alibi

witnesses to the test by ordering a hearing for them to appear in Court. (See Appendix F through I).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: November 3, 2000

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-2406

Remon Lee, Appellant, v. Mike Kemna, Superintendent; Jeremiah (Jay) Nixon, Attorney General, State of Missouri, Appellees.	* * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri. [PUBLISHED]

Submitted: March 13, 2000

Filed: May 25, 2000

Before MORRIS SHEPPARD ARNOLD and FAGG, Circuit Judges, and BENNETT,* District Judge.

PER CURIAM.

Remon Lee was tried in Missouri state court on charges of first degree murder and armed criminal action. During his trial, Lee's alibi witnesses failed to appear and Lee moved for a continuance until the witnesses could be brought to the courtroom.

*The Honorable Mark W. Bennett, Chief Judge, United States District Judge for the Northern District of Iowa, sitting by designation.

"A"

The continuance was denied and Lee was convicted and given a concurrent sentence of life without parole on the murder charge and ten years on the armed criminal action charge. The trial court denied Lee's motion for a new trial which alleged ineffective assistance of trial counsel and violation of his due process rights.

On direct appeal, Lee claimed his trial motion for a continuance and his postconviction motion for a new trial were improperly denied. The Missouri Court of Appeals found the continuance motion was properly denied because it did not comply with Missouri Supreme Court Rule 24.09, which sets out the required form of the motion, and Rule 24.10, which lists the required elements of the motion. The court also found the new trial motion was properly denied because Lee failed to produce evidence showing counsel was ineffective. Lee then filed a 28 U.S.C. § 2254 petition claiming the denial of his motion for a continuance violated due process. The district court denied Lee's habeas petition finding the claim procedurally defaulted. We granted a certificate of appealability on the question of whether denial of Lee's motion for a continuance was a due process violation.

Lee first argues he did not procedurally default his claim. We disagree. Federal habeas review is not available on Lee's due process claim if the Missouri Court of Appeals "rest[ed] [its decision] on a state law ground that is independent of the federal question and adequate to support the judgment," regardless of "whether the state law ground is substantive or procedural." Coleman v. Thompson, 501 U.S. 722, 729 (1991); accord Hall v. Delo, 41 F.3d 1248, 1249-50 (8th Cir. 1994). The Missouri Court of Appeals rejected Lee's claim because his motion for a continuance did not comply with Missouri Supreme Court Rules 24.09 and 24.10 and thus the claim was procedurally defaulted.

We reach the merits of Lee's procedurally defaulted claim only if he can show cause for his default and prejudice or actual innocence. See Wyldes v. Hundley, 69 F.3d 247, 253-54 (8th Cir. 1995). Lee claims his default should be excused because

trial counsel's failure to follow Missouri's motion rules constituted ineffective assistance of counsel. We reject Lee's claim because ineffective assistance of counsel must be presented to the state court as an independent claim before it can be used to establish cause for a procedural default. See id. at 253. Although Lee raised a claim of ineffective assistance in his postconviction motion for a new trial, he did not specifically allege failure of trial counsel to present properly the motion for a continuance. See id. (habeas petitioner must present to state court same specific claim of ineffective assistance made out in habeas petition). Thus, the Missouri courts had no opportunity to consider whether Lee's trial lawyer was ineffective for failing to present the motion properly and Lee cannot present that claim now. Because Lee has not shown cause for his default, we do not reach the issue of prejudice.

An actual innocence claim requires Lee to show "'new reliable evidence . . . not presented at trial'" establishing "'that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" Id. at 254 (citations omitted). Lee has failed to make the required showing because the factual basis for the affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier. See Meadows v. Delo, 99 F.3d 280, 282 (8th Cir. 1996). Even assuming the alibi testimony was new evidence, Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi.

We affirm the denial of Lee's habeas petition.

BENNETT, Chief District Judge, dissenting.

As Justice Fortas observed, "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 292 (1969). "Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'"

Engle v. Isaac, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 96-97 (1977) (Stevens, J., concurring)). With this view of the importance and purposes of a writ of *habeas corpus*, I am unwilling to condone what I believe was a conviction in Lee's case that violates "fundamental fairness." Furthermore, I do not believe that Lee's due process claim has been procedurally defaulted, as the majority concludes, even under the current status of federal *habeas* law, which, in my view, increasingly elevates tortuous and tangled procedural impediments over fundamental fairness. *See Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights" in *habeas corpus* actions). For these reasons, I must respectfully dissent.

To explain why I believe that the decision below must be reversed, I find that a more detailed discussion of the circumstances of this case is required. Lee was tried in Missouri state court on charges of first-degree murder and armed criminal action. At the opening of his trial, Lee's defense counsel promised the jury an alibi defense, complete with three alibi witnesses, who would establish that Lee was not in Kansas City, the location of the murder, on the day of the murder, but was instead in California. Indeed, the promised alibi witnesses—Lee's mother, stepfather, and sister—had voluntarily traveled from California to Missouri to testify on Lee's behalf at his trial and were present at the courthouse as trial began. Moreover, these witnesses were under subpoena and had previously met with defense counsel.

In its case in chief, the government presented the testimony of two witnesses who identified Lee as the getaway driver and two other witnesses who placed Lee in Kansas City within the twenty-four hours preceding the murder. However, the government presented no physical evidence linking Lee to the murder. On the Thursday morning before the state rested its case, Lee's alibi witnesses were present at the courthouse. However, following a lunch recess, the three witnesses could not be located. Lee's alibi witnesses have since provided affidavits in which they aver that

they left the courthouse only after being told by a court security officer that their testimony would not be needed until the following day, because the state's case would take up the remainder of the day. No judge of any stripe, state or federal, trial or appellate, has yet passed on the reason for the alibi witnesses' sudden disappearance from the courthouse just before Lee's defense was to begin.

Upon discovering that Lee's three alibi witnesses were not present in the courthouse after the lunch recess, Lee's counsel orally informed the court of that fact and requested that the court grant a continuance in order for him to attempt to secure the testimony of the witnesses. Trial counsel also informed the court that the witnesses were thought to be still in town, because Lee's mother and stepfather had plans to attend a religious activity in Kansas City that evening. The trial court announced that the trial could not be continued to the following day, Friday, because the judge intended to be at the hospital when his daughter had surgery. The trial court also informed the parties that the trial could not be continued to the following Monday, because the judge had another trial set to commence that day. The state trial judge concluded, without a scintilla of evidence or a shred of information as to why the alibi witnesses were absent, and without making any attempt to enforce the subpoenas for their attendance, that the alibi witnesses had "abandoned" Lee and his defense. As a result of the denial of Lee's oral motion for a continuance, no alibi defense was presented, and not surprisingly—indeed inevitably—Lee was convicted by the state court jury.

On direct appeal, the Missouri Court of Appeals affirmed the denial of Lee's motion for a continuance, concluding that the denial of the motion was proper, because Lee's counsel failed to comply with two Missouri Supreme Court Rules, Rules 24.09 and 24.10. Rule 24.09 requires that motions for continuances be in writing and supported by affidavits, unless the adverse party consents to an oral application. Rule 24.10 sets out the information that must be included in a motion for a continuance that is grounded on the absence of a witness. The state trial court, however, had not relied

upon either of these rules in denying Lee's motion for a continuance, nor had the state resisted the motion on these grounds.

In this action for *habeas corpus* relief, Lee asserts that the denial of his motion for a continuance violated his federal right to due process. The federal district court to which Lee's petition for *habeas corpus* relief was presented concluded from the reliance by the state court of appeals upon its procedural rules that Lee's due process claim was procedurally defaulted. Specifically, the court below concluded that the decision of the Missouri Court of Appeals was based on an adequate and independent state law ground, which bars federal *habeas corpus* review. The majority agrees, and concludes further that Lee cannot overcome this impediment, because Lee is unable to demonstrate either "cause and prejudice" or "actual innocence."

A federal court's review of a *habeas* petition is barred when a state court dismisses or rejects a prisoner's claims on adequate and independent state law grounds, unless a petitioner can demonstrate either (1) cause and prejudice or (2) actual innocence. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). I concur with the majority's conclusions that Lee is unable to demonstrate "cause and prejudice" or "actual innocence." Lee cannot establish the necessary "cause," because he failed to raise before the state court his asserted "cause," which he alleges was his trial counsel's ineffective assistance in failing to follow Missouri's procedural rules for a continuance. *Wyldes v. Hundley*, 69 F.3d 247, 253 (1995), *cert. denied*, 517 U.S. 1172 (1996). I also agree that Lee cannot satisfy the demanding criteria of an "actual innocence" claim, because he has failed to offer new, reliable evidence of his innocence in light of which "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Knox v. Iowa*, 131 F.3d 1278, 1282 (8th Cir. 1997). If Lee had been allowed a short continuance and had been able to present his alibi defense, he might very well have been acquitted, but he might also have been convicted. While the evidence against Lee was not strong, I recognize that a jury would have been free either to accept or reject his alibi defense. Therefore,

I cannot find that Lee meets *Schlup*'s high hurdle of "actual innocence"—even though he may in fact be innocent.

I nevertheless dissent, because I do not believe that we need to reach the question of whether Lee can overcome denial of his due process claim on adequate and independent state law grounds. Rather, I find that the decision of the Missouri Court of Appeals did not rest on any such adequate and independent state law ground. Therefore, I would hold that federal *habeas* review is *not* precluded in this case.

A panel of this court recently discussed the nature of, and limitations to, the bar to federal *habeas* review provided by denial of a claim on an "adequate and independent state law ground" as follows:

> Procedural default of a claim under state law may constitute an independent and adequate state ground, *Harris v. Reed*, 489 U.S. 255, 262 (1989), but only if the state procedural rule is firmly established, regularly followed, and readily ascertainable. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). The underlying principle is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." *Easter v. Endell*, 37 F.3d 1343, 1347 (8th Cir. 1994). Or, as Justice Holmes expressed it, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143 (1923).

White v. Bowersox, 206 F.3d 776, 780 (8th Cir. 2000).

The "adequacy" of a state procedure presents a question of federal law. *Sloan v. Delo*, 54 F.3d 1371, 1379 (8th Cir. 1995), *cert. denied sub nom. Sloan v. Bowersox*, 516 U.S. 1056 (1996). A state law rule is not "adequate" to defeat federal *habeas* review if the rule is "unclear," "thwarts the assertion of federal rights," is "confusing," or is not "firmly established and regularly followed." *Id.* at 1379-80; *see also White*, 206 F.3d at 780 (to be "adequate" to bar federal *habeas* review, a rule must be "firmly established, regularly followed, and readily ascertainable"). A state law ground is not "independent" if it is in any way "linked to or dependent on any federal law." *Easter*, 37 F.3d at 1345. I have no trouble joining the majority's implicit conclusion that the state procedural rules at issue here, Missouri Supreme Court Rules 24.09 and 24.10, are not "linked to or dependent on any federal law," and thus constitute "independent" state law grounds for denial of Lee's motion for a continuance. However, I strenuously disagree that these rules present any "adequate" state law ground to bar federal *habeas* review of Lee's due process claim.

In some recent decisions, this court has found certain state procedural rules were not "adequate" to bar federal *habeas* claims. In *White*, this court concluded that the petitioner was denied a fair opportunity to seek relief in his case, because the procedural rule that barred his second amended petition for state post-conviction relief was neither firmly established nor readily ascertainable. *White*, 206 F.3d at 780. The court found that the Missouri Supreme Court had introduced for the first time in White's post-conviction proceedings two limitations on a recently-recognized remedy for attorney abandonment of a petitioner in post-conviction proceedings. *Id.* at 781. However, this court found that neither limitation could reasonably have been anticipated in advance of its application in the petitioner's case. *Id.* at 781. Importantly, the court held that whether or not a limitation was "implicit in, and correctly derived from, Missouri's prior precedents," or "appear[ed] in retrospect to form part of a consistent pattern of procedures, it should not be applied as a procedural default if the defendant could not be deemed to have been apprised of its existence." *Id.* (citing *Ford*, 498 U.S. at 423). Therefore, "even if . . . th[e state] rule forms a

consistent pattern with prior [state] precedents, we could not apply it as a procedural default in this [*habeas*] case."

Similarly, in *Easter*, this court concluded that Rule 37 of the Arkansas Rules of Criminal Procedure did not meet the due process requirement of "adequacy" to bar a federal *habeas* claim. *See Easter*, 37 F.3d at 1345-46. The rule in question reinstated state post-conviction relief proceedings and set deadlines for the filing of state actions for such relief. *Id.* at 1344. In *Easter*, although this court concluded that Rule 37 otherwise provided constitutionally adequate procedures, it nevertheless was not adequate to bar federal *habeas* claims, because it was not a "firmly established rule when it was applied to Easter." *Id.* at 1346. This court reiterated that conclusion in *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995), holding,

> As in *Easter*, the state has not demonstrated that Pearson was put on notice that he had a Rule 37 remedy before his filing deadline passed. The availability of Rule 37 was not firmly established when Pearson needed to pursue it. Accordingly, Pearson's Rule 37 default is not adequate to support a denial of federal review of the merits of Pearson's constitutional claims.

Pearson, 52 F.3d at 742.

The state procedural rules that purportedly stand as bars to Lee's federal *habeas* due process claim are Missouri Supreme Court Rules 24.09 and 24.10. Rule 24.09 requires that motions for continuances be in writing and supported by affidavits, unless the opposing party consents to an oral application. Missouri Supreme Court Rule 24.10 states that a motion for a continuance, written or oral, based on the absence of a witness must state specific matters, including the materiality of the evidence and diligence to obtain it, reasonable grounds for belief that the attendance of the witness can be obtained within a reasonable time, the facts the witness will prove and that no

other person who could have been procured for trial can prove those facts or prove them so fully, the applicant's good faith. and that the witness is not absent by the connivance, consent, or procurement of the applicant. The Missouri Court of Appeals has explained that "the reason for this rule is obvious, it permits the trial court to pass on the merits of the request." *State v. Robinson*, 864 S.W.2d 347, 349 (Mo. Ct. App. 1993). However, to determine the "adequacy" of the bar to federal *habeas* claims raised by these rules, I must determine whether the application of these rules by Missouri appellate courts to the circumstances presented when Lee moved for a continuance based on the sudden absence of his alibi witnesses in the midst of his trial was firmly established, regularly followed, or readily ascertainable. *White*, 206 F.3d at 780.

I acknowledge that Missouri appellate courts have routinely held that "[f]ailure to comply with Rules 24.09 and 24.10 alone is sufficient to sustain the trial court's ruling" denying a continuance. *See, e.g., State v. Dodd*, 10 S.W.3d 546, 555 (Mo. Ct. App. 1999) (treating a motion for a continuance that was not accompanied by an affidavit as an oral motion to which the state had not consented); *accord Robinson*, 864 S.W.2d at 349 (stating failure to comply with Rule 24.09 was sufficient to deny a request for a continuance, citing *State v. Diamond*, 647 S.W.2d 806, 808 (Mo. Ct. App. 1982)); *State v. Lopez*, 836 S.W.2d 28, 32 (Mo. Ct. App. 1992) (citing non-compliance with either rule, and stating "[d]efendant's failure to request the continuance by written motion accompanied by an affidavit is sufficient grounds to affirm the trial court's ruling"); *State v. Fuller*, 837 S.W.2d 304, 306 (Mo. Ct. App. 1992) ("The failure to comply with rules prescribing means for requesting a continuance is sufficient grounds to deny the request.") (citing cases); *State v. Anderson*, 785 S.W.2d 299, 302 (Mo. Ct. App. 1990) ("We agree that the defendant's failure to request the continuance by a written motion accompanied by an affidavit is sufficient ground for this court to affirm the trial court's ruling," thus relying on failure to meet the requirements of Rule 24.09, but finding "[m]ore important" was non-compliance with the requirement of Rule 24.10 that the personal presence of the witness could reasonably be obtained); *State v.*

Fletcher, 758 S.W.2d 476, 478 (Mo. Ct. App. 1988) ("'Defendant's failure to file the request in writing accompanied by an affidavit showing good cause as required by Rule 24.09 is sufficient ground to affirm the trial court's action.") (quoting *Diamond*, 647 S.W.2d at 808); *State v. Gasaway*, 720 S.W.2d 3, 5-6 (Mo. Ct. App. 1986) ("Where a defendant fails to comply with Rule 24.10, the trial court does not abuse its discretion in denying a continuance.").

I acknowledge further that Missouri appellate courts have routinely affirmed denials of oral motions for continuances that were prompted by the absence of a witness when the motions were made at or near the time of trial, or even during trial, on the ground that the motions did not comply with Rule 24.09 or Rule 24.10. *See State v. Wolfe*, 13 S.W.3d 248, 261 (Mo. 2000) (*en banc*) (affirming denial of an oral motion for continuance made in the course of trial after the trial court's denial of a motion to introduce an affidavit by the absent witness); *Dodd*, 10 S.W.3d at 555 (not indicating precisely when the oral motion for continuance was made, although it was apparently made in proximity to or during trial, and affirming denial of the motion); *Robinson*, 864 S.W.2d at 348 (affirming denial of a motion for continuance pursuant to Rules 24.09 and 24.10 made at "docket call" three days before trial); *Lopez*, 836 S.W.2d at 31-32 (affirming denial of an oral motion for a continuance based on the absence of a witness apparently made on the second day of trial as an alternative to a request for late endorsement of another witness); *Fuller*, 837 S.W.2d at 306 (affirming denial of an oral motion for a continuance owing to the absence of a witness made on the day of trial); *State v. McCarter*, 820 S.W.2d 587, 588 (Mo. Ct. App. 1993) (affirming denial of an oral motion for a continuance owing to the absence of a witness made on the morning of trial); *Anderson*, 785 S.W.2d at 302 (affirming denial of an oral motion made on the day of trial); *Fletcher*, 758 S.W.2d at 478 (affirming denial of an oral motion for a continuance made "[a]fter the jury was seated"); *Gasaway*, 720 S.W.2d at 5 (affirming denial of an oral motion for a continuance made on the third day of trial); *Smith*, 633 S.W.2d at 416 (affirming denial of an oral motion for a continuance made "at the close of trial, before submission to the jury").

However, in *not one* of these cases was the absence of the witness sudden or unexpected. *Wolfe*, 13 S.W.3d at 261 ("Defense counsel told the judge that she had been trying to contact the [absent witness], but no one had seen her in weeks" and "[t]he State replied [to the motion for continuance] that it also could not find the [absent witness]."); *Dodd*, 10 S.W.3d at 555 (both the state and the defendant had attempted to subpoena the absent witnesses for prior proceedings and the defendant "conceded in his motion that he had not been able to locate the [absent witnesses] for several months before his trial"); *Robinson*, 864 S.W.2d at 348 (in premature reliance on a plea agreement that fell through, the defendant had not availed himself of the opportunity to depose the state's witnesses, even though the state had made those witnesses available); *Lopez*, 836 S.W.2d at 31-32 (nothing indicated the absence of the witness was a surprise); *Fuller*, 837 S.W.2d at 306 (the absent witness "had been missing for more than a year, despite extensive efforts to locate her by both sides"); *McCarter*, 820 S.W.2d at 588-89 (in the oral motion, defendant alleged that the absent witness had not been located, had left town, and had no exact address at which he could be located, and counsel stated further that "[w]e are not sure if we can . . . find this man," and the court concluded that the motion was "insufficient on the matter well known before trial" and "the factual basis for the motion was not a last minute or unexpected surprise"); *Anderson*, 785 S.W.2d at 302 (it appeared that the absent witness "had fled the jurisdiction and that a 2-year effort to locate her had been unsuccessful"); *Gasaway*, 720 S.W.2d at 5 (although the oral motion for continuance was made on the third day of trial, the absent witness, who had appeared pursuant to a subpoena on the first day, had been absent the second day of trial, the trial court had issued a writ of body attachment, and the sheriff had made a "diligent" but unsuccessful effort to locate the witness); *Smith*, 633 S.W.2d at 416 (trial counsel had not shown "due diligence in securing the attendance of the witness, or his testimony by deposition for a year before trial," even though the testimony the absent witness was intended to impeach was known to counsel for about a year before trial). The situation was slightly different in *Fletcher*:

> Counsel stated that she was not aware of two of the potential alibi witnesses until a very short time ago. She was unaware of the third until the morning of the trial. The defendant stated he expected an alibi witness to appear but she had been subpoenaed to a child support hearing and could not appear.

Fletcher, 758 S.W.2d at 478. Nevertheless, the absence of the alibi witnesses in that case appeared to have more to do with lack of diligence than sudden and unexpected absence of a witness who had already presented himself or herself at the time of trial. *See id.*

Indeed, the reliance in all of these decisions on the defendant's prior knowledge of the unavailability of the witness, or circumstances that should have suggested to counsel that the witness would be unavailable at trial, implies that a truly unexpected absence of a witness, as occurred in this case, might excuse failure to comply or relax compliance with the written motion requirements of Rule 24.09 and the content requirements of Rule 24.10. *See, e.g., McCarter*, 820 S.W.2d at 589 (specifically noting that failure to comply with the requirements of Rule 24.09 was sufficient grounds to deny a motion for continuance, stating that this was "particularly true where the factual basis for the motion was not a last minute or unexpected surprise").

Thus, I do not find that the application of Rules 24.09 and 24.10 was "firmly established" or "regularly followed" in the circumstances in which Lee made his motion for continuance, that is, circumstances involving the sudden and unexplained absence of alibi witnesses who had been in attendance just prior to a recess after which their testimony was required and who were under subpoena to appear at that time. *Cf. White*, 206 F.3d at 780 (the limitations on the newly-recognized claim of attorney abandonment were introduced only in the petitioner's case, and therefore were not "firmly established" at the time his claim was denied on the basis of those limitations); *Pearson*, 52 F.3d at 742 ("The availability of Rule 37 [of the Arkansas Rules of

Criminal Procedure] was not firmly established when Pearson needed to pursue it."); *Easter*, 37 F.3d at 1346 (Rule 37 of the Arkansas Rules of Criminal Procedure otherwise provided constitutionally adequate procedures, but nevertheless was not adequate to bar federal *habeas* claims, because it was not a "firmly established rule when it was applied to Easter").

Moreover, the possibility that application of Rules 24.09 and 24.10 to the circumstances presented in Lee's case was somehow "implicit in, and correctly derived from, Missouri's prior precedents," or "appear[ed] in retrospect to form part of a consistent pattern of procedures," is not sufficient to bar his federal *habeas* claims, because those rules "should not be applied as a procedural default if the defendant could not be deemed to have been apprised of" their applicability. *White*, 206 F.3d at 780 (citing *Ford*, 498 U.S. at 423). The circumstances in which Lee moved for a continuance make it particularly unlikely that he could be deemed to have been apprised of the applicability Rules 24.09 and 24.10. As a practical matter, it is simply unrealistic to suppose that, when confronted during trial with the sudden and unexplained absence of witnesses who have previously been in attendance, both voluntarily and under subpoena, counsel will be able to produce a written motion, supported by an affidavit, as required by Rule 24.09, detailing expressly the information required by Rule 24.10. Indeed, it appears that neither the trial judge, Lee's counsel, nor opposing counsel considered the applicability of these rules in the circumstances, although the Missouri Court of Appeals later relied upon them to affirm the trial court's denial of a continuance. Therefore, I would hold that applicability of these rules in Lee's circumstances was not only not "firmly established" or "regularly followed," it was not "readily ascertainable." *Id.*

There are yet more grounds on which I would hold that failure to comply with Rules 24.09 and 24.10 does not constitute an "adequate and independent state law ground" for denial of federal *habeas* review. I would also hold that application of these rules in Lee's circumstances stands as no bar, because the rules would "thwar[t] the

assertion of federal rights" in the circumstances of this case. *Sloan v. Delo*, 54 F.3d 1371, 1379 (8th Cir. 1995), *cert. denied sub nom. Sloan v. Bowersox*, 516 U.S. 1056 (1996). In *Henry v. Mississippi*, 379 U.S. 443 (1965), the United States Supreme Court held that a state procedural ground was "adequate" to preclude federal review of a constitutional claim only if it outweighed the strong federal interest in hearing federal claims. *Henry*, 379 U.S. at 447; *cf. Sykes*, 433 U.S. at 88-90 (holding Florida's "contemporaneous objection rule" to be an adequate state ground based on the important state interests it serves). A review of case law reveals instances in which federal courts have found the state interest furthered by the rule in question was not adequate to bar federal *habeas* claims, because that state interest had already been fulfilled. *See Smart v. Scully*, 787 F.2d 816, 820 (2d Cir. 1986); *see also Caston v. Costello*, 74 F. Supp. 2d 262, 274 (E.D.N.Y. 1999) (holding that a state appellate court's application of the "contemporaneous objection rule" did not preclude *habeas* review); *United States ex re. Smith v. DiBella*, 314 F. Supp. 446, 447 (D. Conn. 1970) (holding that rigid adherence to a state procedural rule, which required an appellant to submit a motion to correct a trial court's findings within two weeks after the findings are filed, was "so lacking in fundamental fairness as to constitute 'a miscarriage of justice which should not be permitted to occur.'") (quoting *Christoffel v. United States*, 190 F.2d 585, 594 (D.C. Cir. 1950)).

This line of authorities is exemplified by the decision of the Second Circuit Court of Appeals in *Smart*, 787 F.2d 816. In *Smart*, a petitioner prosecuting his *habeas* action *pro se* sought federal review on the ground that his incompetence at the time he entered his guilty plea had rendered his guilty plea involuntary. *Id.* at 817. In response, the state asserted that the petitioner had procedurally defaulted, because he had not sworn to his allegations of fact, as required by state procedure. *Id.* at 818. The district court denied the petition on the ground that the failure to include sworn allegations constituted procedural default. *Id.*

The Second Circuit Court of Appeals, however, reached the merits of the petitioner's claim, finding that the state court's denial was not based on an "adequate and independent" state ground warranting federal refusal to consider the federal issues. *Id.* at 820. The appellate court reasoned that the state interest in having petitioners swear to their allegations of fact was not sufficient to preclude federal consideration of the petitioner's *habeas* claim, because the petitioner's pleading, "while not in compliance with state procedure, notified the court as to his constitutional claim and gave the state court a clear opportunity to address his claim or allow him to replead." *Id.* The court reasoned further that "Smart's type of error does not at all implicate the concerns expressed in [*Wainwright v. Sykes*, 433 U.S. 72 (1977)]," which related to improper diminution of "the significance of the state proceeding as the appropriate forum for the adjudication of all claims in a state criminal prosecution" to obtain some "strategic advantage." *Id.* at 820-21. Instead, the court could "perceive of no tactical benefit to be derived from Smart's failure," where "[h]is noncompliance with a threshold requirement of post-conviction relief caused him to suffer dismissal of his motion without providing any opportunity for a favorable outcome." *Id.* at 821. Thus, the appellate court in *Smart* found that this was not a situation in which a defendant "could preserve an opportunity for success at the state level while embedding in the state record a basis for possible future habeas relief." *Id* at 821.

Likewise, I can perceive of no situation under which Lee "could preserve an opportunity for success at the state level while embedding in the state record a basis for possible future habeas relief." *Id.* Here, Lee informed the court of all the information he had regarding his witnesses' surprising disappearance. Given the three witnesses' sudden, unexplained absence from the courthouse during the middle of a trial day, it is impossible to imagine that counsel could have done more to meet the requirements of Missouri Supreme Court Rules 24.09 and 24.10.

Furthermore, it is difficult to understand what part of Rule 24.10 was not satisfied, either by counsel's representations at the time he moved for a continuance or

by the circumstances otherwise known to the court; therefore, the trial court was notified of the grounds for the motion for a continuance and was given a clear opportunity to address its merits. *Cf. Smart*, 787 F.2d at 820 (the petitioner's pleadings, "while not in compliance with state procedure, notified the court as to his constitutional claim and gave the state court a clear opportunity to address his claim or allow him to replead," and thus non-compliance with the state procedure was not an "adequate and independent state ground" to bar *habeas* claims). The materiality of the testimony of alibi witnesses in Lee's case was obvious, when counsel had detailed in his opening statements that the alibi witnesses would testify that Lee was in California, not Kansas City, at the time of the murders, and the diligence of the applicant in attempting to obtain the presence of the witnesses was equally apparent, because the witnesses had previously been present and were under subpoena. *See* MO. SUP. CT. R. 24.10(a). Counsel's representation that he believed the witnesses were still in town, because they intended to attend a religious service, in my opinion, established reasonable grounds for belief that the attendance of the witnesses could be procured within a reasonable time. *See* MO. SUP. CT. R. 24.10(b). Counsel's indication in his opening statement of the critical content of the alibi witnesses' testimony adequately indicated what facts the witnesses would prove, and it should have been obvious that no other testimony could adequately establish Lee's alibi defense. *See* MO. SUP. CT. R. 24.10(c). Counsel's representations that the witnesses had been present at the courthouse before the lunch recess and that he had no idea why they had not returned was sufficient, in my view, under the circumstances, to satisfy the requirements of the rule that the witnesses not be absent by connivance, consent, or procurement of the applicant, and that Lee was seeking a continuance in good faith and not simply for purposes of delay. *See* MO. SUP. CT. R. 24.10(d).

However, after quoting the provisions of the rule, the Missouri Court of Appeals stated only, "After a careful review of the record, we find appellant's motion was made without the factual showing required by Rule 24.10," and that denial of a motion based on a deficient application was not an abuse of discretion." *State v. Lee*, No. WD

49456, slip op. at 5 (Memorandum Supplementing Order Affirming Judgment Pursuant To Rule 84.16(b) and 30.25(b)). Thus, the court that relied on Rule 24.10 failed to specify in what respect Lee's motion for a continuance owing to the sudden absence of alibi witnesses was deficient. Furthermore, as I believe any seasoned trial lawyer would agree, requiring that a motion for a continuance be in writing, with supporting affidavits, as required by Rule 24.09, when the motion is made in the midst of trial upon the discovery that subpoenaed witnesses are suddenly absent, would be so bizarre as to inject an Alice-in-Wonderland quality into the proceedings.

It must be remembered that these three witnesses had voluntarily traveled from California to Missouri for Lee's trial and had been present, and apparently ready and willing to testify on Lee's behalf, that very morning. Moreover, Lee's witnesses' affidavits raise a serious factual issue, which no court has addressed, as to whether state action was responsible for the disappearance of the witnesses from the courthouse in the middle of the day on which their testimony was required. The trial court, however, did not even attempt to enforce the subpoenas for these witnesses or otherwise attempt to ascertain why they were suddenly absent. *Cf. Gasaway*, 720 S.W.2d at 5 (the oral motion for continuance was not denied until the day after the absence of the witness under subpoena was discovered, the trial court had issued a writ of body attachment, and the sheriff had made a "diligent" but unsuccessful effort to locate the witness).

In short, this is not a case in which Lee was "sandbagging" the state trial court in a strategic maneuver to forgo adjudication of issues in state court while embedding in the record a ground for future federal habeas corpus relief. *See Smart*, 787 F.2d at 821 (considering whether the petitioner's non-compliance with state rules is simply an attempt to embed in the state record a basis for possible future habeas relief). Rather, Lee effectively placed the state court on notice as to the grounds for his motion for a continuance such that the state court had the opportunity to address the merits of his request. *Id.* at 820 (mere non-compliance with state rules should not preclude federal

review, where the petitioner's defective motion nevertheless gave the state court a clear opportunity to address his contentions). I conclude that, under these unique circumstances, Lee's failure to comply fully with Missouri Supreme Court Rules 24.09 and 24.10 is insufficient to preclude federal consideration of Lee's habeas claim. *See id.* at 820-21. Rather, strict compliance with these rules would "thwar[t] the assertion of federal rights" in the circumstances of this case. *Sloan*, 54 F.3d at 1379.

To put it another way, applying these rules in the circumstances of Lee's case is not "fundamentally fair." *Engle*, 456 U.S. at 126; *accord Strickland v. Washington*, 466 U.S. 668, 697 (1984) (observing that "fundamental fairness is the central concern of the writ of habeas corpus"); *Sykes*, 433 U.S. at 96-97 (Stevens, J., concurring) (measuring the appropriateness of *habeas corpus* relief against a "fundamental fairness" standard). It is instead rampant elevation of procedure over substance. *Cf. Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting) (decrying the elevation of procedural impediments to vindication of federal rights in *habeas corpus* actions). We must not lose sight of the underlying principle behind the bar raised by an "adequate and independent state law ground," which is "'that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court.'" *White*, 206 F.3d at 780 (quoting *Easter*, 37 F.3d at 1347). The procedural rules raised as a bar here provided Lee with no such fair opportunity, in the circumstances of his case, to obtain a continuance and mount his alibi defense.

This case, in no small measure, reflects the current status of federal *habeas corpus* jurisprudence. Judicial interpretation of the Great Writ during the past three decades has spun a cascading web of confounding and labyrinthine procedural obstacles, *see Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting); *Murray v. Carrier*, 477 U.S. 478, 497 (1986) (Stevens, J., concurring in the judgment) ("The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in

a procedural maze of enormous complexity."), notwithstanding that the Supreme Court once recognized that "habeas corpus is not 'a static, narrow, formalistic remedy . . . but one which must retain the 'ability to cut through barriers of form and procedural mazes.'" *Hensley v. Municipal Court, San Jose Milpitas Jud. Dist., Santa Clara County, Cal.*, 411 U.S. 345, 349-350 (1973) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963), and *Harris v. Nelson*, 394 U.S. 286, 291(1969)). This large and increasingly complex web has now virtually obscured the core purpose of the Writ.

Not only has this procedural web taken on a life of its own, it has developed its own unique nomenclature, a procedural cant further obscuring the merits of most *habeas corpus* actions: Rather than addressing the underlying merits of the constitutional claims asserted by a petitioner for *habeas corpus* relief, opinions in *habeas* actions are now riddled (in both the primary and secondary sense of the word) with terms like "procedural default," "cause and prejudice," "abuse of the writ," "successive petitions," "mixed petitions," "adequate and independent state law grounds," "the 'look through' presumption," "the total exhaustion rule," "state waiver of the exhaustion defense," "non-retroactivity," "non-cognizable constitutional claims," "fairly presented claims," "unintended claims," "objective factors external to the defense," and "the presumption of correctness." The vast majority of federal *habeas* petitioners find themselves entangled in this omnipresent and perplexing procedural web, which effectively precludes federal courts from ever reaching the merits of their constitutional claims. For example, when the Third Circuit Court of Appeals recognized that a case before it "illustrate[d] the complexity engendered by the current federal habeas corpus doctrine of procedural default," *Hull v. Feeman*, 991 F.2d 86, 88 (3d Cir. 1993), the court also expressed its concern that its method for breaking free of the procedural web, so that it could reach the merits of the petitioner's claim, might instead "have placed [the petitioner] into an enclosed loop from which he cannot escape." *Id.* at 94 n.6.

With the inevitable focus on this bewildering array of convoluted procedural obstacles, it is all too easy to look past some crucial, simple truths. First, the mystifying procedural web most often traps and snares all but the most sophisticated or just plain lucky petitioners, and Lee is neither. Second, there is a reasonable possibility that Lee is in fact innocent. The case against him, based primarily on shaky eye-witness testimony with no corroborating physical evidence, was not strong. Third, his state court conviction was virtually assured by the trial judge's denial of his oral motion for a short continuance, because he was thereby precluded from presenting his alibi defense. The prejudicial effect of the denial of his motion for a continuance is especially apparent in light of defense counsel's promise, in his opening statement, to present an alibi defense and witnesses. Fourth, the trial court's summary denial of a continuance—on grounds that appear to me to be unreasonable and completely arbitrary, and hence fundamentally unfair, in the circumstances presented and in the face of a justifiable request for a brief delay—most probably amounts to an unconstitutional denial of due process. *See, e.g., McMiller v. Lockhart*, 915 F.2d 368, 372 (8th Cir. 1990) (a *habeas* petitioner's due process claim founded on denial of a motion for continuance of his criminal trial was judged against "fundamental fairness" and "abuse of discretion" standards, in light of the circumstances of the case), *cert. denied*, 498 U.S. 1108 (1991); *White v. Lockhart*, 857 F.2d 1218, 1220 (8th Cir. 1988) (where the *habeas* petitioner asserted a due process violation in the trial court's refusal to continue his criminal trial, the court noted that "'[o]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of justifiable request for delay"' rises to the level of a constitutional violation," quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), and stating that, to prevail, the petitioner "must show that in denying his request for a continuance the district court acted in a manner 'so egregious that it was fundamentally unfair,'" quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)); *Loggins v. Frey*, 786 F.2d 364, 366-67 (8th Cir.) (where a *habeas* petitioner asserts a violation of due process based on denial of a continuance, "'[o]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay"'. . . . may give rise to a violation of due process") (quoting *Morris*,

461 U.S. at 11-12, in turn quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)), *cert. denied*, 479 U.S. 842 (1986). Lastly, it is hard to conceive of a more arbitrary action of a trial judge that could inflict greater prejudice to a defendant in a criminal case than the actions of the trial judge in Lee's case.

In sum, I would reverse the decision of the district court. I would hold that there is no procedural default, because there is no "adequate and independent state law ground" barring federal *habeas* review. Consequently, I would remand this *habeas* action for an evidentiary hearing on Lee's claim that he was denied due process when the state trial court refused to grant him a continuance in order to permit him to secure the testimony of his three subpoenaed alibi witnesses. The district court should have the first opportunity to decide the merits of Lee's federal constitutional claim.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNIT_ STATES COURT OF APP_ _S

FOR THE EIGHTH CIRCUIT

No. 99-2406WMKC

Remon Lee,

Appellant,

v.

Mike Kemna, et al.,

Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

August 8, 2000

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

"D"

UNI_ _ STATES COURT OF A_ _ALS

FOR THE EIGHTH CIRCUIT

No. 99-2406WMKC

Remon Lee,

Appellant,

vs.

Mike Kemna, et al.,

Appellee.

Appeal from the United States District Court for the Western District of Missouri

The appplication filed by Mr. Lee for a certificate of appealability in the above-referenced case has been considered by the Court and is hereby granted. A certificate is issued on the question of whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance.

September 30, 1999

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

"E"

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FILED
APR 19 1999
U. S. CLERK, KCMO
U. S. DISTRICT COURTS
WEST. DISTRICT OF MISSOURI

REMON LEE,)
)
Petitioner,)
)
vs.) Case No. 98-0074-CV-W-6-P
)
MIKE KEMNA,)
)
Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his 1994 conviction for first degree murder and the sentence of life imprisonment without parole pursuant thereto, which were entered in the Circuit Court of Jackson County, Missouri.[1] Petitioner raises seven (7) grounds for relief, all of which respondent contends are procedurally barred from federal habeas corpus review because petitioner did not present them in his consolidated direct appeal and appeal from denial of state post-conviction relief pursuant to Mo. Sup. Ct. R. 29.15. See Respondent's Exhibit 7; State v. Lee, 935 S.W.2d 689 (Mo. Ct. App. 1996) (per curiam). Respondent further contends that petitioner's claims are without merit.[2]

Petitioner raised only two points in his consolidated appeal brief: (1) the trial court erred in overruling his motion for a continuance after his alibi witnesses disappeared from the courthouse before they were to testify; and (2) his trial counsel was ineffective for failing to call petitioner's co-defendant at trial and when the trial court overruled defense counsel's motion for a continuance after petitioner's alibi witnesses disappeared without testifying. Respondent's Exhibit 7, pp. 7-10.

Petitioner raises the following grounds for relief in this federal petition: (1) he was forced against his will to accept an appointed attorney not of his own choosing because he wanted to retain a different attorney when his previously retained attorney withdrew from the case; (2) the trial judge was biased against him based on three specific instances of conduct or comments; (3) the prosecutor committed misconduct by tricking petitioner's alibi witnesses into leaving the courthouse, rushing her case to a close, and commenting to the jury on the absence of the alibi witnesses; (4) the evidence was insufficient to support his convictions; (5) his sentence is constitutionally disproportionate to that of his co-defendant who actually shot the victim; (6) the trial court violated due process by failing to grant him a continuance when his alibi witnesses disappeared from the courthouse and in not allowing him to present his co-defendant's testimony; and (7) the cumulative effect of all the errors rises to the level of a constitutional violation.

Procedural Default – Grounds 1-5 and 7

A review of the record demonstrates that petitioner procedurally defaulted Ground 1 by failing to raise it in his pro se or amended Rule 29.15 motions or in his consolidated appeal brief. Respondent's Exhibits 6 and 8. Grounds 2, 3, 5, and 7 were procedurally defaulted by petitioner's failure to raise them in his motion for new trial or in his consolidated appeal brief. Respondent's Exhibits 5 and 7. Ground 4 also was not raised in petitioner's consolidated appeal brief. Respondent's Exhibit 7.

In Coleman v. Thompson, 501 U.S. 722 (1991), the Supreme Court held:

In all cases in which a state prisoner has defaulted his federal claims in state court

[1]Although petitioner does not state that he challenges his conviction and concurrent ten-year sentence for armed criminal action, the Court notes its existence. See Respondent's Exhibit 9.

[2]Because the Court agrees that petitioner procedurally defaulted Grounds 1-5 and 7, a review of the merits of those claims is unnecessary and inappropriate.

Document # ——— "B"

> pursuant to an independent and adequate procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. Cause, actual prejudice, and the probability of a "fundamental miscarriage of justice" are to be judged under criteria set out in Wainwright v. Sykes, 433 U.S. 72 (1977), and Murray v. Carrier, 477 U.S. 478 (1986). Coleman, 501 U.S. at 748-50.

Petitioner contends that either trial counsel's or appellate counsel's ineffectiveness caused his state procedural default of Grounds 1-5 and 7 and that he is actually innocent of the crimes as evidenced by the affidavits of his mother, stepfather, and sister that he could not have committed the crimes in question because he was with them in California during August, 1992. Doc. Nos. 6 and 12. Petitioner also contends that an officer of the court caused his alibi witnesses to leave the courthouse before they were called to testify.

Petitioner cannot allege ineffective assistance of direct appeal counsel as cause for his state procedural default because he has failed to exhaust such a claim independently in the state courts as he must do before it can be used to establish cause under Murray v. Carrier, 477 U.S. at 489. See Hall v. Delo, 41 F.3d 1248, 1250 (8th Cir. 1994); McKinnon v. Lockhart, 921 F.3d 830, 832 (8th Cir. 1990), cert. denied, 501 U.S. 1208 (1991).

Moreover, ineffectiveness of his Rule 29.15 trial or appellate counsel cannot constitute legally sufficient cause for his default because there is no constitutional right to effective assistance of counsel in state post-conviction proceedings. Coleman v. Thompson, 501 U.S. at 752; Oxford v. Delo, 59 F.3d 741, 748 (8th Cir. 1995), cert. denied, 517 U.S. 1124 (1996).

Petitioner also has failed to demonstrate that an officer of the court caused his alibi witnesses to leave without testifying. See Respondent's Exhibit 8, pp. 12-17. All of his three alibi witnesses

were family members whose explanation for their disappearance at trial was available to petitioner or "discoverable through the exercise of due diligence" during the pendency of petitioner's direct appeal and/or state post-conviction proceedings. Thus, petitioner cannot meet the burden of 28 U.S.C. § 2254(e)(1) and (2) to show that the reason he did not develop the factual basis for his Grounds 3 and 6 in the state courts was because the claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or that they rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." Moreover, petitioner also has the burden of demonstrating that "the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

Petitioner has failed to meet the above standards regarding his failure to present the affidavits of his three proposed alibi witnesses to the state courts. Therefore, those affidavits cannot be considered in this federal habeas corpus proceeding. See Weeks v. Bowersox, 119 F.3d 1342, 1354 n.12 (8th Cir. 1997), cert. denied, __ U.S. __, 118 S.Ct. 887 (1998); Meadows v. Delo, 99 F.3d 280, 282 (8th Cir. 1996).

Not only has petitioner failed to demonstrate cause for his state procedural default, he also has failed to show that he is "probably actually innocent" of the crimes for which he was convicted. Bowman v. Gammon, 85 F.3d 1339, 1346 (8th Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 1273 (1997). Therefore, further review of Grounds 1-5 and 7 is not required to prevent a fundamental miscarriage of justice. Murray v. Carrier, 477 U.S. at 495.

Trial Court Error in Denying Continuance and in Not Allowing the Testimony of Accomplice – Ground 6

In Ground 6, petitioner contends that the trial court violated his right to due process by not granting his motion for a continuance when his alibi witnesses disappeared from the courthouse and by not allowing him to present the testimony of his co-defendant. Respondent contends that petitioner's claim concerning a continuance is procedurally defaulted because petitioner only made a perfunctory citation to the United States Constitution in his Point I on appeal and relied solely on a state law theory of abuse of discretion in his argument. Respondent's Exhibit 7, pp. 7-8, 11-17. The Missouri Court of Appeals held that the motion for a continuance did not meet the requirements of Mo. Sup. Ct. R. 24.10 and that petitioner failed to demonstrate a reasonable probability of a different outcome if the witnesses had testified. Respondent's Exhibit 9, pp. 4-5. Respondent also contends that petitioner's claim regarding the co-defendant was raised as a claim of ineffective assistance of defense counsel for not calling the co-defendant, not as a claim that the trial court would not allow the co-defendant to testify. Respondent's Exhibit 7, p.9.

Although petitioner specifically cited to the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution in his brief on appeal and argued that the denial of the continuance violated due process, Respondent's Exhibit 7, p.7, the Court concludes that petitioner's due process claim in Ground 6 was not "fairly presented" concerning the denial of a continuance because the state court's ruling was based on petitioner's failure to comply with Rule 24.10. See Hall v. Delo, 41 F.3d 1248, 1249-50 (8th Cir. 1994) (federal claim was not fairly presented to state courts when state court declined to decide federal claim on merits because petitioner violated a state procedural rule). The Missouri Court of Appeals rejected petitioner's claim because it was not made in writing and because it was not supported by the factual showing required by Rule 24.10.

As the Missouri Court of Appeals has noted, moreover, petitioner has failed to demonstrate that "the testimony of the absent witnesses [all family members] was so crucial that it is reasonably probable a different outcome would have resulted" even if he had established an abuse of discretion by the trial court in denying the continuance. Respondent's Exhibit 9, p.5. See also Respondent's Exhibit 8, pp. 15-17.[3]

Thus, Ground 6(a) is either procedurally defaulted or without merit, and Ground 6(b) is procedurally defaulted. Petitioner has failed to establish legally sufficient cause for his state procedural default and/or actual innocence for the reasons previously discussed regarding Grounds 1-5 and 7.

Accordingly, it is **ORDERED** that:

(1) the petition for writ of habeas corpus is denied;

(2) petitioner's motion for ruling (Doc. No. 14) is granted; and

(3) this case is dismissed with prejudice.

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated: APR 19 1999

[3]Not only had eyewitnesses to the murder identified petitioner as the driver of the getaway truck, the victim's sister and her neighbor testified that petitioner came to their apartment complex on the night before the murder looking for the victim. Respondent's Exhibit 1, pp. 443-78. Thus, the state had produced overwhelming evidence that petitioner was in Jackson County on the day of the murder and on the previous night.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

Case No. 98-0074-CV-W-6

FILED
MAY 19 1999
U. S. DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND DENYING PETITIONER LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL AND A CERTIFICATE OF APPEALABILITY

On April 19, 1999, this Court denied petitioner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and Judgment was entered pursuant thereto. On May 12, 1999, petitioner filed a motion for reconsideration of the Court's Opinion and Order entered on April 19, 1999, pursuant to Fed. R. Civ. P. 60(b). On May 14, 1999, petitioner filed a pleading entitled "Notice to Clerk of Court Request to Appeal Judgment of District Court." In his motion for reconsideration, petitioner contends that the Court misread the record because petitioner had submitted the affidavits of his co-defendant as well as three affidavits from his family members in support of his claim that he is actually innocent of the crimes for which he was convicted, but the Court made no reference in the April 19, 1999, Opnion and Order of the co-defendant's affidavit.

A review of the April 19, 1999, Opinion and Order reveals that, as argued by respondent, petitioner had raised his claim concerning his co-defendant's proposed testimony as an ineffective assistance of defense counsel claim for failing to call the co-defendant in his Rule 29.15 motion, not as a trial court error as he does in his federal petition. In any event, this Court addressed petitioner's Ground 6(b) and concluded that Ground 6(b) was procedurally defaulted.

Document # 20 "C"

As to petitioner's affidavits of his family members, the Court concluded that they were not "newly discovered evidence" because they were discoverable at the time of petitioner's direct appeal and /or state post-conviction proceedings. The transcript of the sentencing proceedings, Respondent's Exhibit 4,pp. 10, 13-16, demonstrates in a similar manner that the information contained in Reginald Rhodes' affidavit was available to petitioner in his state court proceedings. Petitioner's trial counsel stated at the sentencing hearing that he did not call petitioner's co-defendant to testify at trial because the co-defendant would have had little credibility with the jury (especially because several eyewitnesses to the murder identified petitioner as the driver of the getaway truck). Respondent's Exhibit 4, P. 16.

Given the questionable veracity of Reginald Rhodes' affidavit, petitioner has not demonstrated that no reasonable juror would have convicted him in light of new reliable evidence of his actual innocence which was not presented at trial, Schlup v. Delo, 513 U.S. 298, 326-38 (1995), and which was not discoverable at the time of trial through due diligence. See Meadows v. Delo, 99 F.3d 280. 282-83; Bowman v. Gammon, 85 F.3d 1339, 1342 (8th Cir. 1996), cert. denied, ___U.S. ___, 117 S.Ct. 1273 (1997) (standard for gateway claims of actual innocence as to guilt phase issues).

As to petitioner's notice of appeal, under 28 U.S.C. § 1915, an appeal in forma pauperis may be permitted if an affidavit including a statement of all assets possessed and a certified copy of the inmate account statement for the preceding six months are submitted and if the appeal is taken in good faith. See Fed. R. App. P. 24(a). If the issues sought to be presented are plainly frivolous, the appeal is not taken in good faith. Blackmun, In Forma Pauperis Appeals, 43 F.R.D. 343 (1967).

Further, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court

unless a district judge or a circuit judge issues a certificate of appealability. Fed. R. App. P. 22(b). A certificate of appealability will be issued only if the applicant has made a substantial showing of the denial of a constitutional right and will indicate which specific issue or issues satisfy the showing required. 28 U.S.C. § 2253(c)(2) and (3).

Because petitioner has not stated any basis for overturning the April 19, 1999, Opinion and Order, in Doc. No. 19, this case presents issues which are not deserving of appellate review under the above standards.

Accordingly, it is **ORDERED** that:

(1) petitioner's motion for reconsideration pursuant to Fed. R. Civ. P. 60(b) (Doc. No. 18) is denied; and

(2) a certificate of appealability and leave to proceed in forma pauperis on appeal are denied.

Howard F. Sachs

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated MAY 19 1999

EXHIBIT #2

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,
Petitioner,
vs. Case No: 98-0074-CV-W-8-P
MIKE KEMNA,
Respondent.

AFFIDAVIT OF LAURA LEE

I LAURA LEE, being truly sworn, states under oath as follows:

1. My name is Laura Lee. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge. At all time pertinent hereto, I was a resident of California, until recently, I moved to Dallas, Texas with my parents.

2. I know for a fact that Remon didn't have anything to dowith shooting anyone on August of 1992, because Remon was in California, we hadn't seen him in so long that when he came to see us we didn't want him to leave, cause it wasn't no telling when we would see him again. I know he got to California in July for all the birth-day parties we celebrate together including his own. We all picked him up from the airport cause we were all so happy to see him. I begged Remon to stay for the Holloween party in 1992. So I know he was in California from July 1992 until October 1992 because it was my house he was staying at. So I knew personally when he came and left. We went all the way to Missouri to testify, they took statements from us and everything. Then those people in Missouri told us we could leave because OUR TESTIMONY would not be needed until the next day. Then they went on without US. Had Us travel all that way for nothing. It ain't right. Remon might have done some things but he ain't guilty of no crime in August of 1992.

I, Laura Lee, hereby certify tht the above facts are true and correct.

Subscribed and sworn to before me this 5 day of ~~January~~ February 1998.

Laura Lee
Laura Lee

Norma Jean Burkins
Notary Public

Dated: February 5, 1998

Norma Jean Burkins
Commission Expires
April 5, 1999

"F"

EXHIBIT # 3

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,
Petitioner,
vs.
MIKE KEMNA,
Respondent.

Case No: 98-0074-CV-W-8-P

AFFIDAVIT OF GLADYS EDWARDS

I GLADYS EDWARDS, being truly sworn, states under oath as follows:

1. My name is Gladys Edwards. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was a resident of and at: 1521 Joanne Ct., Oxnard, California, 93030-3428. The pertinent time in question being, July until October of 1992. [Oxnard, referred to as Ventura].

3. The other pertinent part being February of 1994. My personal knowledge as follows:

1st, I have never had any exposure to any of my sons past court dealings. I know my boy has had trouble with the law in the past, although I'm not certain what the exact nature of that trouble has been, other than he went to prison.

2nd, In 1992, I know my boy was released from prison and he promised he would come to see Me [his mother], by his birthday which is July around the same time as two (2) other family members. So we usually hold a family reunion to celebrate the combined birthdays. I say usually meaning my son has been absent from the past few, due to his confinement. In July 1992, my son Remon Lee, kept his promise to make it to California for the Reunions, I was present when Remon was picked up from the airport in California, July of 1992. I further know that he was in California, all the way to October 1992, because we begged him to stay for Holloween.

"G"

3rd, When I heard the boy was in trouble, that he was accused of committing a crime August of 1992. I knew in my mind this time, the accusation was false because the boy [meaning Remon Lee, Petitioner] was in California with the family. So although I never involved myself in his court affairs in the past. My husband, daughter, and myself traveled from California, all the way to Kansas City, Missouri. For the purpose of testifying at the trial of Remon. So the people would know THE TRUTH. The boy was not involved this time. He was in California and we could vouch for him.

Finally, while we [meaning: myself, husband & daughter] were at the courthouse in Kansas City, Mo. a man who identified himself as an officer, told us that the Judge and prosecutor needs him to take a statement from us so they will know what our testimony will be and so there will be a record of our statements. So we gave a statement.

Another officer of the court told us that we will not be allowed to sit in the court-room whild the trial is going on because we are to testify and can't hear what the other witnesses are saying. So we had to remain in separate room. The officer of the court was allfull nice. He would check on us to see if We needed anything, coffee, restroom ; At one point while we were back and forth to the courthouse, it seems like the 3rd day. While we were in the separate room, the officer of the court came and told us that the prosecutor stated that the states case will again take up the re-mainder of that day. That Our testimony will not be needed until the following day, that we could leave until the following day. He [the court officer] told Us not to worry, the Judge knows We came to testify, they have Our statements, and the trial will not be over until we testify. So at those instructions we left. Later we found out, they went on without Us and finished the trial early, so We didn't know what to do after traveling all that way at our own expense, then not being allowed to do what we came to do.

I, Gladys Edwards, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 5 day of February 1998.

Norma Jean Burkins
Notary Public

Dated: February 5 1995

Gladys Edwards
Gladys Edwards
7418 Woodspan Dr.
Dallas, Texas 75232

Norma Jean Burkins
Commission Expires
April 5, 1999

Exhibit #4

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,
Petitioner,
vs
MIKE KEMNA,
Respondent.

Case No: 98-0074-CV-W-8-P

AFFIDAVIT OF MINISTER JAMES EDWARDS

I MINISTER JAMES EDWARDS, being truly sworn, states under oath as follows:

1. My name is James Edwards. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was and still is a Minister. I was a resident in California, in 1992 and 1994. I have recently moved to Dallas, Texas. My present address is: 7418 Woodspan Dr., Dallas, Texas 75232.

3. In February of 1994 my wife and I along with daughter, traveled to Kansas City, Mo. to testify at the trial of my wife's son [Remon Lee]. I gave a statement to a police officer with the Kansas City, police department that, Remon Lee was in California from July until October of 1992. I know this because I was the driver of the car that picked the boy up from the airport in California, and was the driver that took the boy back to the airport when he left California. I was willing to testify to this and this is why we traveled from California for the trial. Further, it is True that while at the Courthouse, we were told by an officer of the court that Our testimony would not be needed until the following day, we were excused until then. We did not travel from California to abandon the boy, we came to testify.

I, Minister James Edwards, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 9 day of ~~January~~ February 1998.

Norma Jean Burkins
Notary Public

Dated: February 9, 1998

James Edwards

Norma Jean Burkins
Commission Expires
April 5, 1999

"H"

Exhibit #1

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

REMON LEE,
Petitioner,
vs
MIKE KEMNA,
Respondent.

Case No. 98-0074-CV-W-8-P

AFFIDAVIT OF REGINALD RHODES

Reginald Rhodes, being truly sworn, states under oath as follows:

1. My name is Reginald Rhodes. I am over 21 years of age, and am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was charged with the death of STEVE SHELBY: that occurred on or about August 27, 1992, and have personal knowledge to the events concerning the death of Mr. Shelby and the conviction of REMON LEE,[in question].

3. I Reginald Rhodes was identified as the shooter [principal], by an eyewitness. I pled guilty to the shooting death of Mr Shelby, as the lone shooter. I was willing to testify at the evidentiary hearing and the trial of Mr Remon Lee, that:

> He was not present, nor involved in the shooting death of Mr Steve Shelby. I was told by the prosecutors office that they wanted Remon Lee, and did not care if he was involved or not.

4. I was told by my attorney that Remon Lee had witnesses to prove his where-abouts on the day and time in question. However, Remon Lee wound up getting maliciously prosecuted for a crime he was not involved in. He even got more time than I [Reginal Rhodes got].

5. I wish to set the record straight, and testify that Remon Lee is innocent.

I, **Reginald Rhodes**, hereby certify that the above facts are true and correct, I have not been coerced in any way, and I am signing this under my own free will.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to before me this 15 day of January, 1998.

Reginald Rhodes 500710
Reginald Rhodes 500710
Jefferson City Correctional Center
P.O. Box 900
Jefferson City, Mo. 65102

Notary Public

Dated: 1-15-98

NOTARIAL SEAL
NOTARY PUBLIC STATE OF MISSOURI
MONTEAU COUNTY
MY COMMISSION EXP OCT 1 2000

"I"

GRANTED

ORIGINAL

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
JAN 5 2001
CLERK

No. 00-6933

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1999

REMON LEE,

Petitioner,

vs.

MICHAEL KEMNA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704
Post Office Box 899
Jefferson City, MO 65102
(573) 751-3321
Counsel of Record

OFFICE OF THE CLERK
SUPREME COURT, U.S.

10 pp

QUESTIONS PRESENTED

Whether the court below erred in finding a claim that a state trial court violated due process, by denying a defense request for continuance, to be procedurally barred.

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Schlup v. Delo, 513 U.S. 89 (1995); 3

Smart v. Scully, 787 F.2d 816 (2nd Cir. 1986); 3

Ylst v. Nunnemaker, 501 U.S. 797 (1991); 3

STATEMENT OF CASE

Petitioner Remon Lee was convicted of murder after two eyewitnesses identified him as the driver of the getaway vehicle used in a murder. Two different witnesses placed Petitioner at the scene of the murder with his accomplice on the night before the killing. Both these witnesses indicated the accomplice asked about the victim.

At trial Petitioner allegedly intended to present his mother, stepfather and sister to testify that Petitioner was in California from July 1992 to October 1992 and therefore could not have committed a murder in Missouri in August 1992.

The witnesses however left the courthouse during trial and the trial court declined to grant a continuance. Trial defense counsel could not explain their disappearance and told the court the witnesses may have been threatened, but he had no proof of that, or that they may have abandoned his client.

At the hearing on the motion for new trial neither Petitioner nor his attorney mentioned an allegation that the family witnesses had been told they could leave by a court officer. Counsel in fact told the court during a post-trial hearing held nearly two months after trial that the witnesses left and went back to California but did not mention any alleged permission to leave given by a court officer and Petitioner himself did not complain about this, although he complained that his accomplice was not called as a witness in his behalf.

Later, in a state post-conviction motion it was alleged that an unknown person believed to be working for the Jackson County prosecutor who told the witnesses their testimony would not be needed. The claim raised in federal habeas corpus position was

that a court officer told the witnesses to leave. This claim was supported by affidavits.

The Missouri Court of Appeals rejected the claim that denying the continuance violated due process finding the claim was procedurally barred because the motion for continuance did not comply with Missouri Supreme Court Rule 24.09, requiring continuance motions be in writing and Rule 24.10 stating what information must be presented in a motion for continuance. The Missouri Court of Appeals in an alternate holding found the claim to be meritless. The district court agreed with the procedural bar and merits analysis. The court below found the claim to be procedurally barred.

Reasons for Denying the Writ

This case presents no real conflict between the decision of the court below and a decision of this Court or another court of appeals. The court below has simply applied existing precedent to a complicated, and very case specific, set of facts.

Nothing in the decision of the court below conflicts with the principles of ***Ylst v. Nunnemaker***, 501 U.S. 797 (1991). The Missouri Court of Appeals in alternate holdings found both that the substantive claim raised was procedurally barred and that it was meritless. In such a case the jurisprudence of this Court dictates that a bar be enforced, as it was in this case. Similarly no conflict exists with ***Davis v. Wechsler***, 263 U.S. 22 (1993). ***Davis*** dealt with the proper venue for a personal injury suit involving a federally controlled railroad and a decision that an objection to jurisdiction was waived by appearance. It has nothing in particular to do with the decision of the court below. Finally, the decision of the court below in no way conflicts with this Court's decision in ***Schlup v. Delo***, 513 U.S. 89 (1995). The alibi testimony Petitioner alleges shows his innocence in this case is neither new nor does it establish that no reasonable juror would have convicted. The alibi affidavits all from relatives of Petitioner by blood or marriage are refuted by the testimony of four disinterested eyewitnesses and, in any event could have been but were not presented at the proper time in state court. No conflict with ***Schlup*** exists.

Smart v. Scully, 787 F.2d 816 (2nd Cir. 1986) is a case in which the Second Circuit found no procedural default occurred when a movant failed to swear to the allegations in a post-conviction relief motion. ***Smart*** has little factually in common with

case except that both involved alleged procedural defaults. Failure to place a claim in writing and failing to set out the proper elements to obtain relief as occurred in this case, are much greater omissions than merely failing to append on oath at the end of an otherwise proper written pleading as occurred in ***Smart***. ***Christoffel v. United States***, 190 F.2d 585 (D.C. Cir. 1950) is a half century old federal criminal case ruling on a motion to extend the time to file a notice of appeal. It has nothing to do with the decision of the court below.

The decision of the court below applies well established principles concerning procedural default to a very specific set of state procedural rules and state cases applying those rules. The decision does not directly conflict with any particular decision of this Court or of any circuit court of appeals. Petitioner is essentially arguing an error occurred in applying well established case law to a narrow fact pattern. This is not a proper case for certiorari review.

CONCLUSION

WHEREFORE, Respondent prays that the petition for certiorari be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704

Post Office Box 899
Jefferson City, MO 65102
(573) 751-8756
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that one (1) true and correct of Respondent's Brief in Opposition to petition for writ of certiorari to the United States Court for the Eighth Circuit in the case of ***Lee v. Kemna*** was forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid this 5th day of January, 2001, to:

Remon Lee
Register No. 167441
Crossroads Correctional Center
115 Pence Road
Cameron, Missouri 64429-8804
Counsel of Record for Petitioner

Ten (10) copies of Respondent's Brief in Opposition were mailed this 5th day of January, 2001, to:

William Suter, Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
Phone: (202) 479-3000

MICHAEL J. SPILLANE
Assistant Attorney General

DISTRIBUTED
JAN 18 2001
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ORIGINAL

No. 00-6933

(4)

Supreme Court, U.S.
FILED
JAN 12 2001
CLERK

THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

REMON LEE, Petitioner,

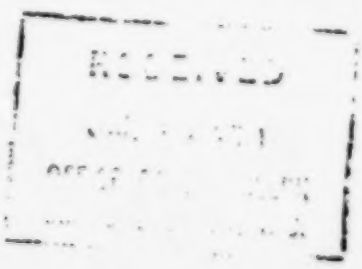
Vs.

MIKE KEMNA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

REMON LEE
#167441
1115 EAST PENCE RD.
CAMERON, MO 64429-8804



12 pp

QUESTION(S) PRESENTED

1). DID THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERR BY AFFIRMING THE DISTRICT COURT'S DENIAL OF LEE'S PETITION FOR HABEAS CORPUS BECAUSE HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN THE TRIAL COURT REFUSED TO GRANT HIM A 19 HOUR CONTINUANCE TO CONTACT HIS THREE SUBPOENAED ALIBI WITNESSES WHO UNEXPECTEDLY DID NOT RETURN AFTER A LUNCH BREAK?

2). SHOULD A HEARING HAVE BEEN HELD ON THE HABEAS CORPUS TO AT LEAST CONSIDER THE TESTIMONY OF THE ALIBI WITNESSES TO THE EFFECT THAT THEY WERE TOLD BY A COURT PERSONNEL, TO LEAVE?

3). IN THE CIRCUMSTANCES IN REMON LEE'S CASE, WAS HIS FEDERAL VIOLATION REGARDING A DENIED REQUEST FOR A SHORT CONTINUANCE, PROCEDURALLY BARRED FROM FEDERAL COURT?

4). HAS REMON LEE MADE A SUBSTANTIAL SHOWING OF ACTUAL INNOCENCE ACCORDING TO THE **SCHLUP** STANDARD FOR HIS ALIBI WITNESSES TO BE EXPLORED FURTHER TO PREVENT A FUNDAMENTAL MISCARRIAGE OF JUSTICE?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution reads in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime....[and] be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment of the United States Constitution reads in relevant part:

> No State shall....deprive any person of life, liberty, or property, without due process of law.

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ARGUMENT

The Petitioner believes that in all actuality, his Constitutional claim is not procedurally barred. (See Certioran petition at 9 - 11). The Missouri Courts as of yet, have not decided on whether or not a defendant who fails to meet the written requirements of **Rules 24.09 and 24.10**, must still meet the written requirements when his witnesses suddenly and without reason, disappear from the courthouse in the middle of trial. Every case used thus far to deny the Petitioner's claim, did not deal with this. Instead, they each dealt with counsel failing to call witnesses or where counsel knew ahead of time that witnesses were missing but failed to set the motion for continuance in writing.

In the Petitioner's case, he was represented by counsel who did the only thing a lawyer could do faced with the "sudden" and "unexplained" disappearance of three alibi witnesses----- he made an oral motion for continuance on the record and informed the court of the facts known to him and the defendant. If trial counsel had not made the oral motion, the trial would have continued immediately. There was no time to type the motion along with an affidavit from the Petitioner to satisfy the requirements of Rules 24.09 and 24.10. Further, on the record, the trial judge gave his specific reasons why he denied the motion for continuance and they had nothing to do with failing to meet the requirements of a rule. (See Certiorari petition, page 10). Thus, the Missouri Court of Appeals' decision to deny

based on Rules 24.09 and 24.10 was based on an unreasonable determination of the facts of the case, which entitles the Petitioner to federal habeas corpus relief. **28 U.S.C. 2254 (d)(1)(2).**

The Respondent insists that the decisions by the lower courts do not conflict with this Court's holding in **Ylst v. Nunnemaker**, 501 U.S. 797 (1991). The lower courts found Petitioner Lee's due process claim procedurally barred. However, the Missouri Court of Appeals did decide in its opinion that the due process claim was meritless. It is impossible to rule a claim meritless unless the merits of that claim are considered. **Ylst** clearly teaches that when a state court reaches the merits, it "removes" any procedural bar to federal court review.

Therefore, the lower court's decision is in direct conflict with this Court's holding in **Ylst**.

The Respondent objects to Petitioner's use of **Davis v. Wechsler**, 263 U.S. 22 (1923), **Smart v. Scully**, 787 F.2d 816, 820 (2nd Cir. 1986); and **Christoffel v. U.S.**, 190 F.2d 585, 594 (D.C. Cir. 1950), (Respondent's brief at 3 - 4). The Petitioner will refer the Court to his Petition For Writ of Certiorari, pages 11 - 12, for his use of these cases, also to the dissenting opinion in the Eighth Circuit. (See Appendix A, of Petition).

The Respondent alleges there is no conflict with the lower courts' opinions regarding Lee's actual innocence, with the

Schlup case of this Court. (Respondent's Brief at 3). The fact is, the Eighth Circuit has adopted a criteria for actual innocence NOT set out by this Court in **Schlup v. Delo**, 513 U.S. 298 (1995), (See Certiorari Petition, pages 12 - 13). The lower courts' interpretation of Schlup conflicts with the very language of Schlup itself. Therefore, the Petitioner's actual innocence showing has not been properly analysed under the Schlup standard. The Petitioner refers the Court to **Reasonover v. Washington**, No. 4:96-CV-1477, U.S. District Court, eastern District of Missouri, August 2, 1999, Slip Opinion, pages 10-17. The Reasonover opinion is a correct interpretation of this Court's wording in Schlup.

Basically, the Eighth Circuit's interpretation excludes all evidence of innocence that was available at the time of trial. This Court, in Schlup dictated that federal courts consider "all" the evidence brought by the Petitioner. **Id.**, 513 U.S. at 328. In fact this Court provided that a Petitioner produce new reliable evidence that was "not presented at trial." **Id.** at 324.

Thus, even assuming the Petitioner's due process claim is indeed procedurally barred, his evidence of "actual innocence" has not been properly tested under Schlup, which could raise the procedural bar and allow federal review of the Constitutional claim.

The Petitioner begs this Court's granting of a Writ of Certiorari to resolve the conflict between the lower courts and

this Court regarding "actual innocence" under Schlup.

CONCLUSION

The Petitioner asks for the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

REMON LEE
#167441
1115 East Pence Road
Cameron, Missouri 64429

PROOF OF SERVICE

I declare pursuant to 28 U.S.C. 1746 under the penalty of perjury that on this 12th day of August, 2001, I have deposited a true copy of the enclosed Reply Brief, first-class, postage prepaid, into the prison's internal mailing box, addressed to the Respondent's attorney, Mr. Michael Spillane, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

REMON LEE

01-12-2001

Supreme Court of the United States
Office of the Clerk
William K. Suter
1 First Street, N.E.
Washington, D.C. 20543

Re: Lee v. Kemna, No. 00-6933

Dear Mr. Clerk:

Enclosed please find a Reply Brief in response to the Respondent's attorney's response to the Court's Order. This Reply Brief is submitted pursuant to Supreme Court Rules 17.5, 33.1(g)(iii), 24.4, 39, and a Proof of Service is enclosed pursuant to Rule 29.

Please file and present these documents to the Justices immediately.

Sincerely,

Remon Lee

Remon Lee
#167441
1115 East Pence Road
Cameron, Missouri 64429

RECEIVED
JAN 17 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAY 1 2001
OFFICE OF THE CLERK

No. 00-6933

IN THE
Supreme Court of the United States

REMON LEE,
Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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Counsel of Record for Respondent

PETITION FOR CERTIORARI FILED: NOVEMBER 3, 2000
CERTIORARI GRANTED: FEBRUARY 26, 2001

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
(KANSAS CITY)

CIVIL DOCKET FOR CASE #: 98-CV-74

Lee v. Kemna, et. al. Filed January 16, 1998

Assigned to: Judge Howard F. Sachs
Referred to: Prisoner Pro Se

Demand: $0,000 Nature of Suit: 530
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

REMON LEE,
Petitioner,

v.

MIKE KEMNA, Superintendent
Respondent,

JEREMIAH (JAY) NIXON, Attorney General,
State of Missouri
Respondent.

[addresses and counsel omitted]

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
		* * * * *
1/16/98	1	PETITION FOR WRIT OF HABEAS CORPUS pursuant to 28:2254 w/req to proceed ifp. (PROV. filed pursuant to Court en banc order of 10/21/97) Def's w/auth (sb)

DATE	NO.	PROCEEDINGS
		* * * * *
2/10/98	5	ORDER TO SHOW CAUSE: by Judge Joseph E. Stevens Jr. (1) pet. granted ifp; and (2) resp ordered to show cause by 3/10/98 (cc: all counsel) (ce)
2/20/98	6	MOTION by petitioner Remon Lee to include documents (ce)
2/24/98	7	ORDER by Joseph E. Stevens Jr. granting motion to include documents [6-1] (cc: all counsel) (ce)
3/11/98	8	Response by respondent Mike Kemna to Order to show cause why petitioner's mt for writ of habeas corpus should not be granted (jr) [Entry date 03/12/98]
3/13/98	—	REMARK: received respondent's exhibits to response to show cause order (dw)
3/16/98	9	ORDER by Judge Joseph E. Stevens Jr. That pet. file a reply to resp's response w/n 30 days from the date of this Order, or this case will be dismissed w/o further notice. (cc: all counsel) (ce)
		* * * * *
5/13/98	12	Reply by petitioner Remon Lee to respondent's response (dw)
1/20/99	13	ORDER: by Judge D. B. Bartlett: reassigning this case to Judge Howard F. Sachs (cc: all counsel) (rs) [Entry date 01/21/99]
		* * * * *

DATE	NO.	PROCEEDINGS
3/25/99	15	Supplement by respondent Mike Kemna re response order [8-1] addressing pet's affidavits (dw) [Entry date 03/29/99]
4/19/99	16	ORDER by Judge Howard F. Sachs denying habeas corpus petition [1-1], granting pet's motion to expedite ruling [14-1] terminating case with prejudice (cc: all counsel) (dw)
4/19/99	17	CLERK'S JUDGMENT Entered on: 4/19/99 this case is dismissed with prejudice (cc: All Counsel) (dw)
5/12/99	18	MOTION by petitioner Remon Lee for relief from judgement reconsideration/ rehearing of habeas petition (dw)
5/14/99	19	NOTICE OF APPEAL by petitioner Remon Lee from Dist. Court decision, [17-1] Filed 4/19/99 Entered 4/19/99 (dw)
5/19/99	20	ORDER by Judge Howard F. Sachs denying motion for relief from judgement reconsideration/rehearing of habeas petition [18-1]; and denying certificate of appealability and leave to proceed ifp on appeal (cc: all counsel)

GENERAL DOCKET FOR
EIGHTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 99-2406
Filed: 5/26/99

Remon Lee, et al v Mike Kemna
Prisoner petition – state – habeas corpus PRO SE
Appeal from: U.S. District Court, Western Missouri

Lower court information:

District: 0866-4 : 98-74-CV-W-8-P
Trial Judge: Howard F. Sachs, Senior Judge
Date Filed: 1/16/98
Date order/judgment: 4/19/99
Date NOA filed: 5/14/99

Fee status: pending

Prior cases: None

Current cases: None

REMON LEE
Petitioner-Appellant,

v.

MIKE KEMNA, Superintendent
Respondents-Appellees,

JEREMIAH (JAY) NIXON, Attorney General,
State of Missouri
Respondents-Appellees,

[addresses and counsel omitted]

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/26/99	Prisoner Case Docketed Dist. Ct. Office: Kansas City, Missouri [1137302] (dgh)
5/26/99	APPLICATION for Certificate of Appealability. [99-2406] [1137307], notice of appeal, docket entries, judgment dated 4/19/99. (dgh)
5/26/99	RECORDS received: Original File, consisting of 1 vol. & 2 exp. folders, Location STL. [99-2406] (dgh)
6/2/99	APPEARANCE for appellee, attorney Michael Joseph Spillane [99-2406] [1140915] (kms)
8/4/99	SUPPLEMENTAL APPLICATION for Certificate of Appealability. [99-2406] [1163751] (dgh)
9/24/99	CASE is no longer pro se. [99-2406] (yml)
9/27/99	C.J.A. voucher issues. E. Ann Wright of Kansas City, Missouri is hereby appointed under the Criminal Justice Act to represent appellant Voucher #99240601. [99-2406] [1184900] (dgh)
9/30/99	JUDGE ORDER: granting application for Certificate of Appealability on the question of whether Mr. Lee's due process rights were violated by the state trial court's failure to allow him a continuance. [1163751-1] [99-2406] [1184883] (dgh)

* * * * *

DATE	PROCEEDINGS
10/19/99	DESIGNATION of record received from Appellees Mike Kemna, Appellees Jeremiah (Jay) Nixon. [99-2406] (yml)
11/2/99	RECORDS received: Clerk's Record, consisting of 1 Volumes, copies 3. Location: STL [99-2406] (stl)
11/2/99	RECORDS received: Exhibits, Located in: STL, consisting of two folders of respondent's exhibits. [99-2406] (stl)
11/24/99	BRIEF FILED - Brief of Appellant - Remon Lee. 44 pgs - w/disk - w/addendum - 10 copies - w/service 11/23/99. [99-2406] [1207700] (yml)
12/27/99	BRIEF FILED - Brief of Appellee - Mike Kemna, Jeremiah (Jay) Nixon. 27 pgs - w/disk - 10 copies - w/service 12/23/99. [99-2406] [1216375] (yml)

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1/10/00	BRIEF FILED - Reply brief - Remon Lee. 12 pgs - w/disk - 10 copies - w/service 1/6/00. [99-2406] [1222024] (yml)

* * * * *

DATE	PROCEEDINGS
3/13/00	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Morris S. Arnold, Circuit Judge, George G. Fagg, Senior Judge, Mark W. Bennett, Visiting Judge (District Judge, Northern District of Iowa; Sioux City, Iowa). E. Ann Wright for Appellant Remon Lee. Michael Joseph Spillane for Appellees Jeremiah (Jay) Nixon, and Mike Kemna. Rebuttal by: Ms. E. Ann Wright. RECORDED. [99-2406] (lad)
3/13/00	APPEARANCE for appellant, attorney E. Ann Wright [99-2406] [1243248] (lad)
5/25/00	THE COURT: Morris S. Arnold, George G. Fagg, Mark W. Bennett. PER CURIAM OPINION FILED: PUBLISHED, DISSENT by Mark W. Bennett [99-2406] [1271964] (paw)
5/25/00	JUDGMENT: Morris S. Arnold, George G. Fagg, Mark W. Bennett : The judgment of the lower court is AFFIRMED in accordance with the opinion. [99-2406] [1271974] (paw)
6/8/00	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellant Remon Lee, w/service 6/7/00., TO COURT., for rehearing by the panel, filed by Appellant Remon Lee w/service 6/7/00, TO COURT. [99-2406] (cmd)

DATE	PROCEEDINGS
7/7/00	Clerk letter sent notifying that party has an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Remon Lee [1277585-1] [1277585-3] [99-2406] Response due by 7/17/00 (srd)
	* * * * *
7/20/00	RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Remon Lee, Remon Lee [1277585-1] [1293492], petition for panel rehearing filed by Remon Lee, Remon Lee [1277585-3] [1293492]. Response filed by Mike Kemna, Jeremiah (Jay) Nixon. w/service 7/18/00 TO COURT. [99-2406] (cmd)
8/8/00	JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [1277585-1] filed by Remon Lee, Remon Lee. Petition for panel Rehearing is also denied. [99-2406] [1299152] (cmd)
9/1/00	MANDATE ISSUED [99-2406] (cmd)
	* * * * *
11/14/00	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 11/3/00. Supreme Ct. Case No. 00-6933 [99-2406] [1355312] (cmd)
	* * * * *

DATE	PROCEEDINGS
3/2/01	Notification from U.S. Supreme Court dated 2/26/01 stating that they had entered an order granting Supreme Court notice for certiorari and granting motion for leave to proceed in forma pauperis. Supreme Ct. No. 00-6933.

[Excerpt from Voir Dire of Jury]

* * * *

[114] tells you a later on, that I'm not entitled to go into it and don't intend to now—that you determine credibility of the witnesses. He'll explain all of that to you.

Now, the next thing sounds facetious but it's not. Bear with me.

I want to know if any of the you object to the accused being defended by little short fat guy with a beards." And the reason I ask that is I asked it a couple of years go and up goes a juror's hand, and he said, " I don't like little fat guys with beards."

So I'm asking you in all sincerity, does anybody object to him being defended by a little short fat guy with a beard?

[No response.]

MR. McMULLIN: I take it not by your silence.

Now, as the Prosecutor's indicated, there's no motive, no physical evidence, no scientific evidence directly tied to the accused. There will be a defense in this case, which is a defense of alibi. An alibi, if you watch television, has evil connotations. Alibi, to most people who watch television, means the bad [115] guy, the mafia member, is really the bad guy and he's just saying he was somewhere else. But it is a valid and legitimate defense, if you find it so, that he was not at the scene, was not even in town at the time. And we'll put on evidence—I can't go into it now—that he was somewhere else, he couldn't commit the crime and I believe the judge will give an instruction on alibi at the conclusion of my case.

Is there anybody here who would not follow the judge's instruction on alibi if he gives that?

[No response.]

MR. McMULLIN: I take it by your silence you would follow the judge's instructions.

Next, is there anyone here that feels a defendant must prove himself innocent or must prove himself not guilty? Some people feel that way. You have a right to, but that's not our law; and the judge won't instruct you that way.

Is there anybody here that feels the defendant must put on any evidence to prove himself innocent, and if he doesn't that might be some evidence of guilt? Anybody feel that

* * * *

[Excerpt from Voir Dire of Jury]

[121] Now, there will be a number of pictures. We're used to it in murder cases, Linda and I. They're 8 x 10 color, bloody pictures. They're not very pleasant, and some people are so shocked when you're not used to seeing it—so shocked—when they see the pictures they say, My God, somebody killed him, he's the accused, he must have done it. And they lose their reason and find guilty simply because of the bloody pictures.

Is there anybody here that feels they would be so as minds would be so—minds would be so inflamed or so upset that you would automatically say the defendant did it, even if the evidence was not there beyond a reasonable doubt?

[No response.]

MR. McMULLIN: I take it not by your silence.

I think I'm about through. Give me just a moment.

Oh, I do have another thing too.

The defendant does not have to put on evidence, but we intend to put on evidence. We intend to put on evidence from—on the alibi of his mother Gladys Edwards who lives in [122] Ventura, California. Does anyone know Gladys Edwards?

[No response.]

MR. McMULLIN: Do any of you know his sister Laura Lee who will testify that he was out there in California in of August of 1992—and obviously couldn't have been here committing the crime? And his stepfather, Mr. James Edwards, a minister who will testify he was out there and he picked him up at the airport and took him back after his visit.

Now, is there anybody here that knows any of those people?

[No response.]

MR. McMULLIN: I take it not by your silence then.

The other part of the defense is the attack on the only eyewitness by a gentleman, a lawyer, by the name of Robert Calbi—C-a-l-b-i—a well known young attorney here in town, and his investigator, Fred Macon—M-a-c-o-n—who works for Mr. Calbi.

And Mr. Calbi took a report, a statement of the State's main witness which is contradictory—I can't go into it in detail—

* * * *

[Excerpt from Defendant's Opening Statement]

[194] Then the next part of the defense evidence will be, as I talked to you earlier, called an alibi. If you're not here or at the scene of [195] the crime, you can't commit it. We will put on three witnesses for the defense, and you will see them and be able to evaluate them and see whether or not they're liars or not. You can determine for yourself.

You will hear from Mr. James Edward—not necessarily in this order. Mr. James Edwards is an elderly black man who lives in Ventura, California. He is married to Reggie's mother now. Her name is Gladys Williams. And Mrs. Gladys Williams has a daughter by the name of Laura Lee, who has four daughters. Ms. Laura Lee lives in Ventura, California.

Mr. Edwards will testify that in July of '92 he and his wife were and still are living in Ventura. Laura Lee lived in Ventura, and Reggie—Remon Lee was to come out on July the 9th for a birthday party of Laura's daughter Maria, and that he was also to be there for his birthday, which is July the 10th. And she will testify, as will Mr. and Mrs. Edwards, that they are a close-knit family.

But Remon didn't get out there on the 9th or the 10th but two or three days later. Mr. Williams {sic} and his wife will tell you very [196] frankly that they drove to Los Angeles from Ventura, met Remon at the airport and took him back to Laura's house where he stayed for July, August, September. And he came back a day or two before Halloween in August of '92, and they remember that because they were having a big birthday party for Laura's four children and they begged Remon to stay for the Halloween party on the 31st of October. But he came back few days before. And Mr. Lee will tell you he took him back himself to the airport. Mr. Edwards, I mean.

Mr. Edwards will testify that he didn't see him every day. He saw him at least once a week in July, August, September and through October. Mrs. Edwards will testify that she went with her husband to pick him up a couple of days after August the 9th, and that they were a close-knit family and having a party for Maria on the 9th, and he was to be there on the 10th and he met them at the airport. And she saw him almost every day in July, August—till August 27th, 1992—September and October.

And Laura Lee will testify that the mother and father brought him to her house. He stayed at [197] her house all of July, all of August, all of September, and all of October until he came back. And she saw him every day because he ws living in a bed in her house.

That will basically be our evidence. I will ask simply until you've heard all of the evidence and the instructions of the judge, that you keep your minds open and not form or express any opinions, at which time I will ask you for a verdict of not guilty.

I thank you very much.

The COURT: Counsel, you may proceed with your case.

THURSDAY, FEBRUARY 24, 1994
AFTERNOON SESSION

[In session without the jury present at 1:06 p.m.]

[572] MR. McMULLIN: Judge, at this time outside the hearing of the jury I'd like to put the defendant back on the stand. I advised him before trial that he had a right to testify and not right to testify, but I always like to ask them again after the State closes their case to be sure, in case there's any change.

THE COURT: Right.

MR. McMULLIN: Sir, would you take the stand, please.

[Defendant takes stand.]

REMON LEE,

having been previously sworn by the Deputy Clerk of Court, testified:

DIRECT EXAMINATION by Mr. McMullin:

Q. Sir, you've previously been sworn?
A. Yes, sir.
Q. And you understand you're still under oath?
A. Yes, sir.
Q. Now sir, you sat here during this entire trial with me assisting me in the trial, and we've [573] talked together during recesses and you've—we've written each other notes; is that true?
A. Yes, sir.
Q. And you testified outside the hearing of the jury before we started, and I advised you of your rights. You had a right to testify or not to testify, and that was entirely up to you. I told you that?
A. Yes, sir.
Q. And I told you all the advantages of testifying and all the disadvantages, didn't I?
A. Yes, sir.

Q. I told you that I recommended that you not testify, but that was up to you. You could say you want to, and you certainly have a right to do so.

You understand that?

A. Yes, sir.

Q. Now the State has rested and we put on part of our defense, and three of our witnesses, your stepfather, your stepmother, or your real mother, and—let's see, Gladys Edwards is your mother, right?

A. Yes.

Q. James Edwards is your stepfather?

[574] A. Yes, sir.

Q. And Laura Lee is your older sister?

A. Yes, sir.

Q. And they came in from California to testify, didn't they?

A. Yes, sir.

Q. And you're aware they came into my office Monday, and I talked with them. You're aware of that?

A. Yes, sir.

Q. And you've talked with them since then?

A. Yes, sir.

Q. And you're aware that the Kansas City Police went out and talked to them, Officer Wantland went out and talked to them a day or two ago?

A. Yes, sir.

Q. Out at what at Brooklyn—

A. Thirty-second and Brooklyn.

Q. Thirty-first and Brooklyn?

A. Thirty-second and Brooklyn.

Q. Thirty-second and Brooklyn.

And you're aware they were here this morning?

A. Yes, sir.

Q. At 8:30?

[575] A. Yes, sir.

Q. For the record, they called me last night. Originally when they came into town Monday, they were staying at the Cloud 9 Motel at 87th and Blue Ridge, weren't they?

A. Yes, sir.

Q. And then they moved from there to whose house?

A. My uncle's.

Q. What's his name?

A. Robert Brown.

Q. Robert Brown?

A. Yes, sir.

Q. All right.

And they told me on the phone there, for the record, they didn't have a phone. And they didn't have, did they, because you couldn't call them out there, could you?

A. Yes, sir.

Q. But they called me last night and agreed to come down, and you saw them here at 8:30 this morning, didn't you?

A. Yes, sir.

Q. And during one of our two recess, 9:00 or 10:00 or 11:00 you saw them in the—you knew they were here, didn't you?

[576] A. Yes, sir.

Q. And for the record, they're gone. They left at 11, according to people I talked to out there. We don't know where. You've called your girlfriend, Alicia Roberts, haven't you, trying to locate them?

A. Yes, sir.

Q. She told you she couldn't find them?

A. Yes, sir.

Q. And I left my mobile pager—not pager—but my mobile telephone number here in my pocket, and she—she called me a few minutes ago and said she hadn't heard from them.

We don't know where they went, do we?

A. No, sir.

Q. And I told you previously when they got here that I'd given them subpoenas along with copies of their statements, didn't I?

A. Yes, sir.

Q. And they were here. We don't know why they left, do we?

A. No, sir.

Q. Did I tell you now that there's nothing I can do if they're not here?

A. Yes, sir.

[577] Q. All I can do is proceed without them and do the best I can.

Do you understand?

A. Yes, sir.

Q. Is there anything you think you ought to do or want me to do or that I refused to do to try to get them back here during—for this trial?

A. Well, I would like to know if we can get a couple hours' continuance and try to locate them, because it's very valuable to my case.

Q. All right.

I'll ask the Court for that at the proper time.

I suppose we could ask for a capias, and—but if they're from California I don't know. Anyway—

A. I know in fact they didn't go back to California, sir. I know that.

Q. How do you know that?

A. Because they have some ministering—my stepfather's a minister—to do here tonight and tomorrow night.

Q. Well, getting back—we'll cover that later.

Getting back to this, you still—you understand your rights. You still have a right [578] to testify and a right not to testify?

A. Yes, sir.

Q. And one of the reasons that I recommend you not testify is you were found guilty on an assault case with armed

criminal action a month or two ago in a separate case in Jackson County, weren't you?

A. Yes, sir.

Q. And Judge Ely give you 50 years and 8 years to run consecutive on those two, didn't he?

A. Yes, sir.

MS. KOCH-CARROLL: No, 50 and 30.

Q. [BY MR. McMULLIN:] Okay. Fifty and thirty to make it a total of eighty years?

A. Yes, sir.

Q. And you have several other felony convictions; isn't that true?

A. Yes, sir.

Q. And you understand—I told you if you get on the stand and testify, they could get—they can introduce those to the jury. But if you don't testify, this jury won't know about it.

You understand that?

A. Yes, sir.

Q. And the judge has given an instruction or [579] approved an instruction he's going to give, he's indicated, that says the fact that you do not testify cannot be used as evidence against you.

You understand that?

A. Yes, sir.

Q. So do you want to testify or not testify?

A. No, sir.

Q. Again, out of an abundance of caution, do you understand, sir, that if you're convicted tomorrow or next year or the year after, and you try to come back and say, "Well, hey, I wanted to testify and McMullin wouldn't let me or somebody threatened me or they lied to me," you're not going to get anywhere.

You understand that?

A. Yes, sir.

Q. All right.

MR. McMULLIN: Your Honor, I have no further questions of this witness.

THE COURT: All right.

I think you've made a good record with respect to his rights and his right to testify or not. And you've made—well, do you intend to file a motion for a continuance?

MR. McMULLIN: He's asked for one, [580] Judge. I think I better ask for a continuance on the thing. The jury can go home now until tomorrow, and I'll have to get my subpoenas—my copies of my subpoenas out of my file which I served, and we'll have to ask for capiases for them. I've got an address out there, 30—I've got it here—3220, I believe it is, Garfield. I've got it in my file here.

I'll have to ask for a continuance until 9:30 in the morning, tomorrow morning. Tomorrow is Saturday.

THE COURT: Mr. McMullin—

MR. McMULLIN: Friday.

THE COURT: Friday. And my daughter is going to be in the hospital all day.

MR. McMULLIN: Oh, I'm sorry.

THE COURT: So I've got to stay with her.

Now, let me ask you: These people were not actually served with subpoenas?

MR. McMULLIN: No, I served them with subpoenas in my office. They came from California voluntarily, sir.

THE COURT: Okay.

MR. McMULLIN: And got to my office [581] Monday, which was a holiday.

THE COURT: So you actually served them the subpoenas?

MR. McMULLIN: Yes, sir. I took their statements, and—their handwritten statements and gave them a copy of their handwritten statements, which I have here; and gave them a—the subpoena, and I've got the copies in my file.

MS. KOCH-CARROLL: What day did you subpoena them for?

MR. McMULLIN: Monday—I subpoenaed them for Tuesday, but told them not to come until—I put on my subpoena "Do not come until called."

I do that on all my witnesses, so they don't sit there all day.

MS. KOCH-CARROLL: What day did you subpoena them for, yesterday?

MR. McMULLIN: I don't know. Let me look.

[A discussion was held off the record.]

MS. KOCH-CARROLL: Was it yesterday? They have been here?

[582] MR. McMULLIN: Gladys Edwards, I issued the subpoena, had the girl fill it out for 2-17 to order them to appear in 6 on Thursday the 24th at 9 a.m.

THE COURT: Is she the mother?

MR. McMULLIN: Gladys Edwards is the mother, yes, sir.

MS. KOCH-CARROLL: Yes, sir.

MR. McMULLIN: Freddie Macon was issued on the 17th, but he's not the one—there was—

MS. KOCH-CARROLL: The 24th is today—

MR. McMULLIN: Yeah.

MS. KOCH-CARROLL: —at 9:30.

MR. McMULLIN: I said 9:00.

MS. KOCH-CARROLL: Nine o'clock.

MR. McMULLIN: But they were in Monday, and your officer talked to them yesterday or the day before and I gave them copies of it then.

THE COURT: Well, I'm going to have to deny the motion for continuance. It looks to me as though the folks were here and then in effect abandoned the defendant. And that, of course, [583] we can't—we can't blame that on the State. The State had absolutely nothing to do with that. That's—it's too bad. The Court will not be able to be here tomorrow to try the case.

MR. McMULLIN: How about Monday, Judge? The jury's not locked up. Could we set it over until Monday morning?

THE COURT: I've got another case set for trial that will take a week starting Monday morning. I'm not in a position to grant a continuance under these circumstances. The folks were here today. They were seen here on this floor of the courthouse, and they apparently simply have abandoned—

MR. McMULLIN: Well—

THE COURT: —the defendant in—although they're family, despite the fact that they're under subpoena.

MR. McMULLIN: It looks like that, Judge. I don't know. I would—I can neither confirm nor deny. It may be that someone threatened them, but I have no proof of that. They may, as the Court said, have been abandoned. I don't know.

[584] THE COURT: I have to deny the motion for continuance.

MR. McMULLIN: All right, sir.

THE COURT: We have to go ahead with the trial.

MR. McMULLIN: All right, sir.

Did you see them out there?

UNIDENTIFIED MAN: No, sir. They are not on this floor.

MR. McMULLIN: All right.

Judge, I'm prepared to—when they come back in—to rest and again file a motion for judgment of acquittal, at the conclusion, which I'll file—

THE COURT: You're going to give that to me that orally and you'll supplement that with a written motion?

MR. McMULLIN: Yes, sir, I will.

THE COURT: Okay.

MR. McMULLIN: And then before I rest—well, I better—we'll ask to pass the exhibits first.

THE COURT: Yeah.

MR. McMULLIN: And then after they go, then I'll rest.

[585] THE COURT: Bring the jury down.

THE BAILIFF: Yes, sir.

THE COURT: Thank you.

[A discussion was held off the record.]

MR. McMULLIN: Judge, for the record, Officer Clark—you're a correctional officer?

OFFICER CLARK: Yes, sir.

MR. McMULLIN: And you have custody of the defendant?

OFFICER CLARK: Yes, sir.

MR. McMULLIN: And you saw Mr. and Mrs. Edwards and his sister out there with me this morning in the witness room next to where the defendant was—

OFFICER CLARK: I saw who you were speaking with. I don't know who—

MR. McMULLIN: You saw the three elderly—two elderly and one middle-aged black lady?

OFFICER CLARK: Yes, sir.

MR. McMULLIN: Black man, elderly black lady, and young black lady?

MS. KOCH-CARROLL: Has he been sworn?

MR. McMULLIN: No. All I'm doing is [586] get him as a witness. In case something comes back I got his name.

MS. KOCH-CARROLL: Oh, okay.

MR. McMULLIN: I'll swear—what do you want me to swear to?

THE BAILIFF: Jury coming in, please.

[Jury in at 1:18 p.m.]

* * * *

[589] THE COURT: All right. That's what will be done. After jury retires, the bailiff will take up the assembled exhibits that have been admitted into evidence.

All right. Now, does the defense rest?

MR. McMULLIN: Yes, sir. For the record, to protect my record, I had three more witnesses, the stepfather, Mr. James Edwards who I subpoenaed; the defendant's mother, Gladys Edwards, who I subpoenaed; and older sister, Laura Lee, that I subpoenaed.

[Counsel approached the bench, and the following proceedings were had:]

MS. KOCH-CARROLL: Mr. McMullin, do we want to do this out loud in front of the jury?

[Proceedings returned to open court:]

The COURT: They're not here, are they?

[590] MR. McMULLIN: Now, they couldn't—

THE COURT: All right.

MR. McMULLIN: They were here and have gone.

THE COURT: All right.

MR. McMULLIN: They came from California. I don't know why they've gone.

THE COURT: All right. Okay.

So the defense rests?

MR. McMULLIN: So the defense rests.

THE COURT: All right. Thank you.

* * * *

[Excerpt from Defendant's Closing Argument]

[618] gets on—and I heard the tape of one of them, of Mr. Williams, who says a man named Reggie Rhodes was driving the truck.

Ladies and gentlemen, I'm an old man, been in this business 43 years, seen a little of criminal cases. Never seen one as weak as this. But it's up to you. You can go out here if you got a good conscience and say, "What the devil, just another black man, let's find him guilty and get out of here and let's all go home." That ain't justice, and I don't think you'll do that in Jackson County. And if a jury ever did, God help any of us if they're going to convict on testimony like this.

Not one piece of scientific evidence. No motive. Nothing except the statement of those two people. And it's very rare that a lawyer can impeach as thoroughly the two witnesses

for the State as I was able to do in this case. And I was able to do it because nothing is as powerful as the truth.

I know you'll do what's right. There are a lot of little things I can't mention, and I'm sure she'll bring them up.

I do apologize. I don't know what happened [619] to my witnesses. They're not here. Couldn't put them on on the question of alibi. But even without that, it hinges on whether or not you could convict a man of murder in the first or second degree from testimony of Sanders and the other man, Willie—Reggie Williams. That is the issue.

I ask you to do what's right. I ask you to think about it, discuss it with each other, and I think that you will bring in a verdict of not guilty. I do not believe that you could in good conscience find a man guilty of Murder I or Murder II on the uncorroborated testimony of those two people. Not one piece of evidence.

Your Honor, I have nothing further. Thank you very much.

THE COURT: All right. Prosecutor, you may proceed.

MR. McMULLIN: Judge, I'm going to return—you might check them to be sure they're all there and in order—the instructions.

STATE'S CLOSING ARGUMENT

MS. KOCH-CARROLL: That last little speech that Mr. McMullin made about this being

* * * *

[Excerpt from Prosecutor's Closing Argument]

[624] getting stared down and you think something is going to go down as Will Sanders said, and you're scared to death, you're so scared you run from the police initially after you see this guy shot in cold blood, what do you think? Three

seconds? Ten seconds? Is that a huge margin of difference? I don't think so.

All the evidence in this case has pointed to the fact that Reginald Rhodes' was the shooter and this man drove the car. And that makes them guilty of at least murder in the second degree, if not murder in the first degree.

Where are those alibi witnesses that Mr. McMullin promised you from opening. They're not here.

No doubt Remon Lee was in town here on August 26th and August 27th.

Lynne Bryant has no reason to lie to you.

Will Sanders has no reason to lie to you. He doesn't want to be here. He doesn't want to be a witness to this offense. Neither did Reginald Williams. They were just kids. They didn't want to be a part of this. But unfortunately a guy got killed in front of their

* * * *

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Case No. CR93-0453
Division 11

STATE OF MISSOURI,

Plaintiff,

v.

REMON LEE,

Defendant.

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

COMES NOW the defendant herein, Remon Lee, by his attorney of record and respectfully moves this court for an order setting aside the finding of guilt of the jury herein of Thursday, February 28, 1994, in the above styled cause, and sustaining his Motion for Judgment of Acquittal at the Close of All the Evidence, or in the alternative, to grant him a new trial in accordance with Supreme Court Rule 29.11 for the following reasons among others:

1) The jury found the defendant guilty of Count I Murder in the First Degree, a Class A Felony, and Count II, Armed Criminal Action, a Class A felony.

2) The court erred in failing to sustain the defendant's Motion for Judgment for Acquittal at the Close of All the Evidence for the reason that the State failed to prove beyond a reasonable doubt that the defendant was involved' in the murder in driving the truck from which the actual shooter allegedly entered and left the scene. The State charged the defendant acted in concert with the shooter and the only

evidence to attempt to prove beyond a reasonable doubt that the defendant was the driver of the truck came from State's witness, Reggie Williams, who testified he was in a yard four houses down, saw the truck come by before the shooting, and he observed for two seconds as the truck went down the street and turned around, and for two seconds on return. He testified to four seconds in his deposition. At the trial, he testified that he observed the defendant driving the truck, observed him for two seconds as the truck first went by and for ten seconds on the return trip: then a car came by involving the victim and the shooter and parked: that the shooter got out of the victim's car, shot him, and 'then ran over and entered the truck driven by the defendant, and fled the scene. The State failed to prove beyond a reasonable doubt that the defendant knew that the shooter was going to shoot the victim, or get into his truck after the shooting.

3) That the court erred in failing to sustain the Defendant's Motion for Judgment of Acquittal at the Close of All the Evidence for the reason that the State's evidence on identification by Reggie Williams was insufficient as a matter of law to sustain a conviction for the reason that State's witness, Reggie Williams, admitted that he gave a recorded statement, which was played for the jury, to attorney, Robert Calbi, and Mr. Calbi's investigator, Freddy Macon in Mr. Calbi's office after the shooting, when Mr. Calbi was representing this defendant, in which he stated that he could not identify the defendant as the driver of the truck and a man named Reggie Rhodes was' the driver of the truck.

4) That the court erred in failing to sustain the Defendant's Motion for Judgment of Acquittal at the Close of All the Evidence for the reason that the State's witness, Willie Sanders, testified he was with State's witness, Reggie Williams, and they were playing with a Moped approximately four houses down from' the scene, that he saw a truck go by driven by the defendant, turn around and come back and park

for some half an hour, and that he saw the driver for approximately two seconds on the first pass by, and ten seconds on the second pass by, and saw the truck parked for approximately half an hour when the victim drive by in his car with the shooter and the victim parked, the shooter got out of the victim's car, went around to the driver's side, shot the victim, ran and jumped in the truck and sped away. He then testified that he had never been asked by the police at any time they questioned him if he could identify the driver of the truck, the defendant, and was never shown a photo line up or other line-up containing a picture of the defendant. On cross examination, confronted with a police report by Detective Wantland and Detective DeValkenaere, he admitted a few hours after the shooting, on the day of the shooting, that he was shown a photo line-up containing the defendant's picture and he was unable to identify the defendant as being the driver of the truck.

4) The court erred in failing to sustain the Motion for Judgment of Acquittal at the Close of All the Evidence for the reason that the court improperly injected itself into the case by taking over the questioning of State's witness, Willie Sanders, and asking the witness if he was positive he could identify the defendant whereupon the witness testified he was positive the defendant was the driver of the truck and the court then asked whether or not either lawyer had additional questions, and when defense counsel responded "I do", the court stated, "I'll bet you do" causing the jury to break into laughter. Thereafter, on cross examination, the State's witness, Willie Sanders, after having stated on direct examination and cross examination he had never been asked by the police if he knew who the driver of the truck was and had never been shown photos or a line-up . to see if he could pick the defendant out of the line-up, the police had indeed on the day of the shooting shown him a photo line-up of several black males including a picture of the defendant and that he had been unable to pick the defendant as the shooter. This

comment by the Judge that "I'll bet you do" in response to the Judge's question, "Does counsel have any further questions?", was improper and highly inflammatory.

5) That the court erred in failing to sustain the defendant's Motion for Judgment of Acquittal at the Close of All the Evidence for the reason that there was no scientific evidence, as admitted by the prosecutor in her voir dire, opening and closing statements, to tie the defendant to the crime, and that the prosecutor's case would rely wholly upon the alleged eye witness testimony of State's witness, Reggie Williams and Willie Sanders.

6) The State's evidence, when taken as a whole, failed to establish proof beyond a reasonable doubt that the defendant knew the shooter was going to shoot the victim, or was acting in concert with the shooter to kill the victim.

7) That while a motive is not required in a murder case, the State admitted in voir dire, open statement, and closing argument, that no motive for the defendant's participation in the crime had been proven beyond a reasonable doubt, and no motive for the defendant's alleged participation was proven beyond a reasonable doubt.

8) The State's evidence failed to prove beyond a reasonable doubt for the foregoing reasons, that the defendant was the driver of the get away truck, that he knew that the shooter was going to shoot the victim, or that the defendant acted in concert with the shooter.

9) That the court erred in failing to grant the defendant a continuance in the trial from Thursday noon until 9 a.m. the following morning on Friday, or to issue a body attachment for defense witnesses, James Edwards, stepfather of the defendant; Gladys Edwards, mother of defendant; and, Laura Lee, sister of the defendant, who had been subpoenaed and had appeared at 8:30 a.m. on Thursday, February 24, 1994, and were waiting in the witness room to testify on behalf of

the defendant. Defendant's attorney went to the witness room at 11 a.m. on Thursday, February 24, 1994, to get the witnesses and they had disappeared and a diligent search of the area was unable to find them. They had been subpoenaed on Monday, February 21, 1994, and the prosecutor's investigators had been allowed to talk to them on Tuesday, February 22, 1994, and they appeared in the courthouse on Thursday, February 25, 1994, but left with no notice to defendant or his counsel. That the failure of the court to give the defendant until the next morning to attempt to locate them, or to issue a body attachment for said witnesses who were to establish the alibi of the defendant as being in California, at his parent's house on August 27, 1992, at the time of the killing. The failure of the court to grant the defendant a reasonable continuance to attempt to find the witnesses, or the court to issue a body attachment, is prejudicial error and denied the defendant a fair trial.

WHEREFORE, the defendant prays the court to grant his Motion for Judgment of Acquittal, or in the alternative, for a New Trial in accordance with the law.

Respectfully submitted,

/s/ James L. McMullin
JAMES L. MCMULLIN #14788
1125 Grand Avenue, Suite 810
Kansas City, Missouri 64106
(816) 421-6979
FAX (816) 421-1524

ATTORNEY FOR DEFENDANT

IN THE CIRCUIT COURT OF MISSOURI
16th JUDICIAL CIRCUIT

Case No. CR92-0453

STATE OF MISSOURI,
Plaintiff,

v.

REMON LEE,
Defendant.

Honorable Anthony P. Nugent, Jr.
Sitting in Division 101

TRANSCRIPT OF SENTENCING PROCEEDINGS

On Tuesday, April 19, 1994, the above cause came on for hearing before the Honorable Anthony P. Nugent , Jr., sitting in Division 101 of the Jackson County Circuit Court at Kansas City, Missouri.

APPEARANCES

The State of Missouri was represented by Ms. Linda Koch-Carroll, Assistant Prosecuting Attorney, Jackson County, Missouri.

The Defendant was present in person and represented by his attorney, Mr. James L. McMullin, 810 Merchants Bank Building, 1125 Grand Avenue, Kansas City, MO.

* * * *

[8] DEFENDANT: No.

THE COURT: The only sentence that the Court can impose in this case, as I understand it, is a sentence of life in the custody of the Department of Corrections of the State of Missouri without the opportunity of parole or probation on Count I, the Murder First Degree conviction.

On Count II, the maximum on that —

MR. McMULLIN: Is life. Three to life, Judge. We would ask for something less.

THE COURT: As to Count II, then, it is less than life.

SENTENCING

So in accordance with the laws of the State of Missouri, the Court now imposes upon Remon Lee, the Defendant in this case, of Count I, a sentence of life in prison without the benefit of parole or possibility of probation.

And as to Count II, the Court imposes a sentence on the Armed Criminal Action Statute of ten years in the custody of the Department of Corrections of the State of Missouri.

Now, I have a further duty, Mr. Lee, of advising you as to something about which I know you are already aware, but I have to advise you [9] that you have a Right to Appeal and the Right to Counsel. If you are unable to pay the cost of the appeal, you may have a Court—appointed counsel represent you in that appeal and proceed in forma pauperis.

Are you in a position to pay counsel to handle your appeal?

DEFENDANT: No, Sir.

THE COURT: That being the case, I would like to relieve Mr. McMullin of his duties in this case. And I will direct that the Public Defender of the State of Missouri undertake to represent you in the appeal in this case.

Now, I also have a further duty in the case where you have been convicted, as you have in this case, and judgment being entered as it just has, to advise you that you have a right in this case under Rule 29.15 of the Rules of Criminal Procedure of the State of Missouri in the event that you think counsel did not adequately represent you in your defense in this case.

And I'd like to ask you a few questions about that now.

Mr. McMullin represented you during the trial, isn't that correct?

[10] DEFENDANT: Yes.

THE COURT: Were you satisfied with the representation that he gave you in the trial of this case?

DEFENDANT: Yes, Sir. I was satisfied with Mr. McMullin's represent—the way he represented me.

THE COURT: You had an earlier attorney, didn't you?

DEFENDANT: Yeah. Robert Cowden.

THE COURT: And you were not satisfied with Mr. Cowden's services?

DEFENDANT: No, Sir.

THE COURT: All right. Let me ask you another question or two. Did Mr. McMullin do everything you asked him to do in the preparation for and in the trial of this case?

DEFENDANT: Yes. He did everything, but I wanted a witness that had pled guilty to this case to come and testify that I had no involvement of this crime.

THE COURT: Right.

DEFENDANT: And nobody ever do that. And I wanted him at my trial.

THE COURT: Okay, did you call this to [11] your counsel's attention—Mr. McMullin?

DEFENDANT: Yes.

THE COURT: And did you know why that witness did not appear?

DEFENDANT: No, Sir.

THE COURT: Was there anything else that happened in the course of the preparation for the trial or the trial itself to which you would like to call the Court's attention now about the advice you got or the representation you got by counsel?

DEFENDANT: From McMullin?

THE COURT: From McMullin?

DEFENDANT: I think he did a wonderful job.

THE COURT: You don't think it was Mr. McMullin's fault that that witness did not appear?

DEFENDANT: Well, I can't say, because I'm not affected by it. But I wanted him at my trial.

THE COURT: You wanted Mr. McMullin?

DEFENDANT: No. I'm talking about the witness.

THE COURT: The witness. Excuse me.

DEFENDANT: Yes.

THE COURT: All right. Now in addition [12] to the question of whether or not he did everything you wanted him to do, is there anything he did that you did not want him to do—Mr. McMullin—in the course of preparation for or conducting this trial?

DEFENDANT: No, Sir.

THE COURT: All right. That being the case, I am obliged to make a determination *as* to whether probable cause exists to believe that the Defendant has received ineffective assistance of counsel.

So far as I know, nothing appears in the record nor in my memory that would lead me to believe that Mr. McMullin ineffectively assisted you in the course of preparing for trial or in trying this case, and I so find there is no probable cause to believe that Mr. McMullin has failed you in any way.

Therefore, it is the judgment of this Court as heretofore stated that you be imprisoned in the Department of Corrections for the rest of your natural life without the benefit of parole or probation under Count I, and for ten years under Count II.

Is there anything else?

[13] MR. McMULLIN: Yes, Judge. I might respond. I am surprised, as I don't recall him ever before, during or after the trial mentioning that witness or I would have had him there. But we tried to get all of the witnesses that we could in. And I think his mother and father—your mother and father were here, too, then?

DEFENDANT: Yes.

MR. McMULLIN: And they left before they could testify. They went back to California.

But I subpoenaed all that I could. But I would like to ask him a question if I could.

THE COURT: Would you ask him the name of the witness?

MR. McMULLIN: Yes, Sir. I will.

EXAMINATION BY MR. MCMULLIN:

Q. What was the name of the witness that you say had pled guilty?
A. Reginald Rhodes.
Q. And he had pled guilty to this crime?
A. Yes.

Q. And had you talked to him?

A. Well, we talked on three-way phones, and we wrote each other letters. And he said that he would come to Court and testify that I had no [14] involvement in this crime, that I wasn't present, that I had no knowledge of it.

Q. I see. Well, I have no recollection at all. I'll check my file again, but I have no recollection at all of you ever telling me about that, or I would certainly have had him there if I could.

In my opinion, even if he had testified that—did he plead guilty to the same crime?

A. Yes.

Q. In my opinion, I doubt very much if a jury would believe you. It's been my experience in 40 years of trying criminal cases that they wouldn't believe him anyway to exonerate you completely in view of the State's testimony. But I will check mine, but I have no recollection.

THE COURT: Mr. McMullin, my recollection of it is that Rhodes was tried by a jury and was found guilty, is that correct?

MR. McMULLIN: No. He pled guilty I think.

MS. KOCH-CARROLL: No, Your Honor. He pled.

THE COURT: Okay. Did he plead guilty before this trial?

MR. McMULLIN: Yes, Sir.

[15] MS. KOCH-CARROLL: Yes.

THE COURT: Okay. Well, my recollection is mistaken.

MR. McMULLIN: It'll check my file, but I'm sure he believes that.

Q. (By Mr. McMullin) But we discussed your case at length many times—several times and getting your family back, didn't we?

A. Yes. I'm positive of—in fact, I know I mentioned that witness to you—that I wanted him there.

Q. Well, I have no recollection. I'll check my file, but I'm sure I would have had him there.

But did you have any complaints, Sir, about any other way I handled the case?

A. No. No.

THE COURT: Do you know whether or not Mr. Rhodes would have agreed to this—

DEFENDANT: Yes. He agreed. He had plans on coming. Then when no one never subpoenaed him, he wrote me and asked me why haven't he been subpoenaed and why haven't no one came and got him yet. Arid I told him my trial was over with, and they found me guilty.

Q. (By Mr. McMullin) Sir, I take it your [16] recollection is you told me about that before trial?

A. Before trial. Yes.

Q. Why didn't you tell me about it during the trial so we could at least sent the subpoena or writ out?

A. Well, my understanding—I had told you about all the witnesses I want, and you had told me you have subpoenaed everyone. And then—

Q. But I told you in advance who our witnesses were going to be. Don't you remember? Your mother, your father and your sister?

A. Right.

Q. And you made no mention of this other witness you're talking about. Why didn't you say, "Well, you didn't get that guy for me."?

A. You had told me in the visiting room over at the county jail that wouldn't no jury believe him anyway.

Q. I'm sure I did. Just like I told you now.

A. And if I had to take the stand, there wouldn't be no jury believe me on a stack of bibles. That's the reason why I didn't take the stand. And that's the reason I assume Reginald Rhodes didn't come back.

[17] Q. Did we make a record that you had a right to testify or not to testify? I thought we did.

A. Yes, but—I mean you had agreed—I had agreed with you that I didn't want to testify. We had an agreement on that.

Q. I see.

MR. McMULLIN: I have nothing further, Judge.

THE COURT: Anything else?

MR. McMULLIN: No, Sir.

THE COURT: That being the case—

MR. McMULLIN: Judge, could I get a copy of that order as soon as possible? We only have ten days starting tomorrow to get the Public Defender to file an appeal on him. And I want to be doggone sure that they get it in time so his appeal will go in.

THE COURT: Which order are you referring to?

MR. McMULLIN: The sentencing order and appointing—it'll all be in one order.

THE CLERK: I'll do it today and have you sign it.

THE COURT: Oh, okay.

MS. KOCH-CARROLL: Judge, the Notice of [18] Appeal—and I may be wrong. Mr. McMullin obviously does this end of things more often than I do. But usually the trial attorney goes ahead and files the Notice of Appeal. Does that get you into something?

MR. McMULLIN: I respectfully disagree, because I don't have to spend my money to file the appeal, see? So sometimes they do it—

MS. KOCH-CARROLL: I didn't know the Notice of Appeal involved expenditure of funds. I filed one appeal in my lifetime.

MR. McMULLIN: See, I've been relieved. Now, since I've been relieved, I'd have to pay money. If they'll put in that order, as the Judge has, that I'm relieved, and the Public Defender is appointed to handle the appeal and I get a copy of it, I'll rush it over to the Public Defender. Sometimes in transporting it back and forth it doesn't get there. And that way it will be filed on time.

THE COURT: Well, you can go ahead and file your Notice of Appeal and—

MR. McMULLIN: I can't, Judge. I've been relieved. And what I need is a copy—she'll get me a copy of the order within ten days.

[19] I'll get it over to the Public Defender, and we'll see that it's filed. But, see, when I'm relieved, the Criminal Records won't file it without a filing fee and the Public Defender is appointed. So I'll get it over.

THE COURT: I guess I have relieved you of your duties. Haven't I?

MR. McMULLIN: Yes, Sir.

THE COURT: So if the Clerk will furnish Mr. McMullin with a copy of the order—

MR. McMULLIN: Within ten days, we're fine.

THE COURT: All right.

Court's adjourned.

* * * *

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CASE NO. CR93-0453
DOCKET Q

STATE OF MISSOURI

Plaintiff,

vs.

REMON M. LEE, DOB 7/10/66,

Defendant.

JUDGMENT

(Jury Trial - No Probation)

On April 19, 1994, came the attorney for the State, Linda Koch-Carroll, and defendant appeared in person and by attorney, Jim McMullin.

The Court having heard the arguments of counsel, and having been fully advised in the premises, hereby overrules defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury, or in the Alternative, for a New Trial.

Defendant having been found guilty on February 24, 1994, upon a plea of not guilty and a verdict of guilty of the offense(s) of: Count I-Murder in the First Degree, Class A Felony and Count II-Armed Criminal Action, Class A Felony of the Information; and the Court having informed the defendant of the verdicts and having asked defendant whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court;

IT IS ADJUDGED that defendant is guilty of said offense(s) as found by the jury.

IT IS ORDERED AND ADJUDGED that defendant is sentenced and committed to the custody of the Missouri Department of Corrections and Human Resources for a period of Life Without Parole on Count I and ten (10) years on Count II, each to run concurrently;

IT IS FURTHER ORDERED that. defendant be given credit for all time served on the charge(s) herein.

IT IS FURTHER ORDERED that the Court Administrator deliver a copy of this Judgment and Commitment to the Jackson County Department of Corrections, and that said copy serve as the commitment of the defendant.

IT IS FURTHER ORDERED that the State of Missouri have and recover from the defendant the sum of $68.00 for the Crime Victims Compensation Fund, and that execution issue therefor.

IT IS FURTHER ORDERED that the Court finds no probable cause to believe that defendant had inadequate or ineffective assistance of counsel.

Defendant has been advised of his rights pursuant to Supreme Court Rule 24.035 or 29.15.

IT IS FURTHER ORDERED that Defendant is remanded to the custody of the Jackson County Department of Corrections for safekeeping and to await transport to the Missouri Division of Adult Institutions.

IT IS FURTHER ORDERED that the Court hereby grants leave for Jim McMullin to withdraw from the case and the Appellate Public Defender is appointed to represent the defendant on appeal

Signed: This 19th day of April, 1994.

/s/ Anthony P. Nugent, Senior Judge
ANTHONY P. NUGENT, Senior Judge
Sitting in Division 101

I hereby certify that copies of the forgoing order were duly delivered this 14th day of April, 1994, to:

Assistant Prosecuting Attorney.
Attorney for Defendant
Jackson County Department of Corrections
State Board of Probation and Parole
Criminal Data Entry
Criminal Section
/s/ Debbie Guy
DEBBIE GUY, Division Clerk

50

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS

MOTION TO VACATE, SET ASIDE OR CORRECT THE JUDGMENT OR SENTENCE

FORM NUMBER 40

IN THE CIRCUIT COURT OF **JACKSON COUNTY, MISSOURI** COUNTY, STATE OF MISSOURI

FULL NAME OF MOVANT
REMON M. LEE

VS.

STATE OF MISSOURI
RESPONDENT

CASE NO **CV94-28462** SJ
(TO BE SUPPLIED BY THE CLERK OF THE CIRCUIT COURT)

INSTRUCTIONS - READ CAREFULLY

In order for this motion to receive consideration by the Circuit Court, it shall be in writing (legibly handwritten or typewritten), signed by the movant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, movant may furnish his answer to a particular question on the reverse side of the page or an additional blank page. Movant shall make it clear to which question any such continued answer refers.

This motion must be filed in the Circuit Court which imposed sentence.

The movant is required to include in this motion every ground known to him for vacating, setting aside or correcting his conviction and sentence or it will be waived or abandoned. Be sure to include every ground.

Since every motion must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for making a false affidavit. Movants should therefore exercise care to assure that all answers are true and correct.

If the motion is taken *in forma pauperis*, it shall include an affidavit setting forth information that establishes that movant will be unable to pay costs of the proceedings. When the motion is completed, the original and two copies shall be mailed to the Clerk of the Circuit Court from which he was sentenced.

MOTION:

1. PLACE OF DETENTION
Potosi Correctional Center, Rt. 2, Box 2222, Mineral Point, MO. 63660

2. NAME AND LOCATION OF COURT WHICH IMPOSED SENTENCE
The Circuit Court of Jackson County, Missouri in Division 11
Kansas City, Missouri 64106

3. THE CASE NUMBER AND THE OFFENSE OR OFFENSES FOR WHICH SENTENCE WAS IMPOSED
Cause No. CR93-0453

4A. THE DATE UPON WHICH SENTENCE WAS IMPOSED AND THE TERMS OF THE SENTENCE
Sentenced on April 19, 1994 to Count I. Murder First Degree and Count II. Armed Criminal Action. Count I. Life w/o Parole and Count II. 10 years concur

4B. THE DATE UPON WHICH YOU WERE DELIVERED TO THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS TO SERVE THE SENTENCE YOU WISH TO CHALLENGE
May 31st, 1994

5. CHECK WHETHER A FINDING OF GUILTY WAS MADE
- [X] (A) AFTER A PLEA OF GUILTY
- [ ] (B) AFTER A PLEA OF NOT GUILTY

6. DID YOU APPEAL FROM THE JUDGMENT OF CONVICTION?
- [ ] YES
- [X] NO

IF YOU ANSWERED "YES" TO (6), LIST

7A. THE NAME OF THE COURT TO WHICH YOU APPEALED
*** APPEAL STAYED PENDING RESULT OF 29.15 CIRCUIT COURT PROCEEDINGS.**

7B. THE RESULT IN SUCH COURT AND THE DATE OF SUCH RESULT.
N/A

8. STATE CONCISELY ALL THE GROUNDS KNOWN TO YOU FOR VACATING, SETTING ASIDE OR CORRECTING YOUR CONVICTION AND SENTENCE:

(A) *** SEE ATTACHED PAGES FOR ALL GROUNDS OF RELIEF SOUGHT.**

(B)

(C)

[redacted]

EXHIBIT A

45

BEST AVAILABLE COPY

Movant submits that his alibi was that he was not present at the time of the offense was alleged to have occurred and further that the offense could not have occurred as the state contends and the evidence as the state submitted it. This was the heart of movants defense, that he was with James I. Gladys Edwards (William) and Laura Lee who resides in Ventura, California, who would/will testify that in July 92 was to come out to Venture for a birthday party and did not leave until late October 92. Failing to instruct the Jury concerning movant's alibi defense clearly demonstrates that movant counsel's skill fell far below an objective standard of reasonableness and resulted in prejudice to movant's case since the jury was never instructed on the crucial fact that the state the burden of proving movant's presence at the place and at the time wherein the offense was alleged to have occurred in view of the fact the state's star witness gave variances as to the identify of the driver of the truck, in *McClain vs. State*. 560 S.W. 2d 894 (Mo. App 1978), the court stated that the defense attorney was not ineffective in failing to request an aibi instruction when under the circumstances of that case, defense counsel might have concluded that to emphasize alibi testimony concerning alleged homosexuality of certain defense witnesses which would be morslip offensive to the jury. However, in the instances case, the testimony and evidence as well as the rebuttal testimony presented was not morally offensive and therefor, there was no justiciable reason for movant's attorney to not request an aibi instruction, and his failure to do so constituted ineffective assistance of counsel.

In support of this submission movant will rely on the transcript, legal file, testimony of JAMES & GLADYS EDWARDS, LAURA LEE, testimony of TRIAL COUNSEL, and the testimony of movant, and any other evidence and witnesses as may be found pursuant to further investigation and discovery.

Movant's Counsel did not file an objection with the court nor did he lodge his motion to modify the said instruction nor preserve the issue within the movant's motion for new trial.

The United States Supreme Court in *Holland vs. United States*, 348 U.S. 121, 140 (1954), suggested an acceptable definition would define reasonable doubt as "the kind of doubt that would make a person hesitate to act." Deviation from the "hesistate to act" language have resulted in reversible error. *See Cage vs. Louisiana*, 111 S. Ct. 328 (1990), *Monk vs. Zeley*, 901 F2d 885, 889-90 (10th Cir. 1990), reversing convictions where reasonable doubt defined as a "substantial honest, conscientious doubt", *United States vs. Cambell*, 874 F.2d 838 843 (1st Cir. 1989)(warning that defining reasonable doubt as "a fair doubt would impose a lesser burden on the prosecutor). Movant acknowledges contrary authority to this argument. *See State vs. Antwine*, 743 S.W. 2d 51, 62-3 (Mo.banc 1987), *cert. denied*, 486 U.S. 1017 (1987). He present this point to provide the court the opportunity for reconsideration and to preserve the issue for appellate review. In support of this claim movant will rely upon the transcript and court file in cause no. CR93-0453, the testimony of movant, trial counsel, and *Judge Anthony R. Nugent*, and any other evidence and witnesses as may be found pursuant to further investigation and discovery.

b. Movant received ineffective assistance of counsel when movant's then counsel failed to submit an alibi instruction to the jury supporting his defense that he did not commit the alleged homicide. The failure of counsel to so request the said instruction on alibi violated his rights under the 5th, 6th, and 14th amendments to the United States Constitution as well as Art. 1, Sec 2, 10, 18(a) and 22(a) of the CONST. OF MO. and those rights under 29.15(i) by counsel causing an illegal judgement of conviction and sentence to be imposed upon the movant herein.

Movant will introduce his legal file containing his instructions is devoid of an alibi instruction upon his defense that he was not present at the time of the alleged homicide commission. Movant will take the stand and testify to these facts and much much more.

Movant will introduce two alibi defense instructions that were reasonably available to counsel and would have been issued to the jury upon him requesting the same. The said alibi defense instructions read as follows:

308.04 ALIBI:

One of the issues (in this case) is whether the Defendant was present at the time and place the offense is alleged to have been committed. On that issue you are instructed as follows:

1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed.

2. If the evidence in this case leaves in your mid a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed, then you must find the defendant not guilty. MAI-CR3d 308.04 (1987)

308.06 ALIBI: (ONLY IF REQUESTED IN THIS FORM)

One of the issues (in this case) is whether the defendant was present at the time and place the offense is alleged to have been committed. On that issue you are instructed as follows:

1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed.

2. If the defendant was (in) (at) (place) at the time the alleged offense was committed, or if you do not find that the defendant was present at the time and place the offense is alleged to have been committed, then you must find the defendant not guilty.

MAI-CR3rd (1987)

APPLICATION FOR POST CONVICTION RELIEF

1. Movant was denied his right to the effective assistance of counsel and due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 and 18(a) of the Missouri Constitution, when:

a. Trial Counsel failed in his duties to object to the giving of Instruction No. 4 in the trial of Movant's case, as well as his failure to file a motion to modify reasonable doubt instruction because the said instruction violated the movant's rights to effective assistance of counsel rights to due process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I Section 10 of the MO. CONST., in that said instruction equates proof beyond a reasonable doubt with the lesser civil standard of "clear and convincing" evidence, and thereby dilutes the state's burden of proof in criminal cases.

The actions Committed and the actions committed by counsel prejudiced the movant's right to a fair trial as the instruction misinformed the jury as to the standard of proof that must be met by the state's attorney. A reasonable Competent attorney rendering similar services under the existing circumstances, See *Strickland vs. Washington*, 104 S.Ct. 2052 (1984), would have objected to the use of such instruction as well as filed a motion to modify the same because he would have wanted his client to have a fair trial and a fair trial would have consisted of movant's counsel's objection's and motion to modify the reasonable doubt instruction. Movant was prejudiced by counsel's actions because he was convicted based upon evidence that was diluted by a standard of proof given by definition of the probative evidence which requires proof beyond a reasonable doubt.

Movant submits that, in defining proof beyond a reasonable doubt as proof that leaves jurors "firmly convinced", the trial court diminished the meaning of reasonable, thereby violating his right to due process of law as guaranteed by the state and federal constitutions.

(b) THE PROCEEDINGS IN WHICH EACH GR[illegible] WAS RAISED

N/A

(c) IF YOU HAVE FILED PRIOR PROCEEDINGS IN ANY STATE OR FEDERAL COURT INVOLVING THIS SAME SENTENCE BUT DID NOT RAISE THEREIN ON[illegible] OR MORE OF THE GROUNDS YOU NOW LIST IN (8). STATE WHICH WERE NOT RAISED IN THE EARLIER PROCEEDINGS AND WHY THEY WERE NOT RAISE[illegible] IN THOSE PROCEEDINGS

a. N/A

b.

c.

(9) WERE YOU REPRESENTED BY AN ATTORNEY AT ANY TIME DURING THIS COURSE OF

a. YOUR PRELIMINARY HEARING? ☐ YES ☐ NO N/A Did not Have Preliminary Hearing.
b. YOUR ARRAIGNMENT AND PLEA? ☒ YES ☐ NO
c. YOUR TRIAL, IF ANY? ☒ YES ☐ NO
d. YOUR SENTENCING? ☒ YES ☐ NO
e. YOUR APPEAL, IF ANY FROM THE JUDGMENT OF CONVICTION OR THE IMPOSITION OF SENTENCE? ☐ YES ☒ NO
f. PREPARATION, PRESENTATION OR CONSIDERATION OF ANY PETITIONS, MOTIONS OR APPLICATIONS WITH RESPECT TO THIS CONVICTION, WHIC[illegible] YOU FILED? ☐ YES ☒ NO

(10) IF YOU ANSWER "YES" TO ONE OR MORE PARTS OF (9), LIST

(a) NAME AND ADDRESS OF EACH ATTORNEY WHO REPRESENTED YOU:

James D. McMullin, 1125 Grand Ave. Suite 810, Kansas City, MO 64106
Robert Calbi, 912 Baltimore, Suite 400, Kansas City, MO

(b) THE PROCEEDINGS AT WHICH EACH SUCH ATTORNEY REPRESENTED YOU:

Mr. McMullin; C and D, above in Section 15
Mr. Calbi; D, above in Section 15

(11) ARE YOU NOW UNDER SENTENCE FROM ANY OTHER COURT THAT YOU HAVE NOT CHALLENGED? ☐ YES ☒ NO

(12) IF YOU ARE SEEKING TO PROCEED *IN FORMA PAUPERIS*, HAVE YOU COMPLETED THE SWORN AFFIDAVIT SETTING FORTH THE REQUIRED INFORMATI[illegible] SEE INSTRUCTIONS, PAGE 1 OF THIS FORM)? ☒ YES ☐ NO

SIGNATURE OF MOVANT

Renon Lee

RENON M. LEE, movant in this case, being duly sworn upon my oath state that I ha[illegible] subscribed to the foregoing petition; that I know the contents thereof; that the above information is, to the best of my knowledge, true and correct; th[illegible] I have listed every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that I understa[illegible] that I waive any ground for relief known to me that I have not listed in this motion.

SIGNATURE OF MOVANT

Renon Lee

[illegible] NOTARY SEAL

STATE OF MISSOURI
COUNTY (OR CITY OF ST LOUIS): Washington
ON THIS: 17 DAY OF November 19 97
BEFC[illegible] MI
NAME OF NOTARY (PRINT OR TYPE): Sherry Lynn Wise
A NOTARY PUBLIC IN AND FOR SAID STA[illegible] PERSONALLY APPEARED
NAME OF INDIVIDUAL (PRINT OR TYPE): Renon Lee
KNOWN TO ME TO BE THE PERSON W[illegible] EXECUTED THE WITHIN
TYPE OF DOCUMENT: 27.15
AND ACKNOWLEDGE TO ME THAT HE/SHE EXECUTED THE SAME I[illegible] THE PURPOSES THEREIN STATED
NOTARY PUBLIC SIGNATURE: Sherry Lynn Wise
MY COMMISSION EXPIRES: DEC 23, 1997
USE RUBBER STAMP HERE

SHERRY LYNN WISE
Notary Public - Notary Seal
STATE OF MISSOURI
Washington County
My Commission Expires: December 23, 1997

[illegible] 93-1347 (7-96)

9

[illegible] 93-1347 (7-96)

8

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BEST AVAILABLE COPY

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(8) THE PROCEEDINGS IN WHICH EACH GR[illegible] WAS RAISED

N/A

(9) IF YOU HAVE FILED PRIOR PROCEEDINGS IN ANY STATE OR FEDERAL COURT INVOLVING THIS SAME SENTENCE BUT DID NOT RAISE THEREIN ON OR MORE OF THE GROUNDS YOU NOW LIST IN (8), STATE WHICH WERE NOT RAISED IN THE EARLIER PROCEEDINGS AND WHY THEY WERE NOT RAISE IN THOSE PROCEEDINGS

a. N/A

b.

c.

(10) WERE YOU REPRESENTED BY AN ATTORNEY AT ANY TIME DURING THIS COURSE OF

a. YOUR PRELIMINARY HEARING? ☐ YES ☐ NO N/A Did not Have Preliminary Hearing.

b. YOUR ARRAIGNMENT AND PLEA? ☒ YES ☐ NO

c. YOUR TRIAL, IF ANY? ☒ YES ☐ NO

d. YOUR SENTENCING? ☒ YES ☐ NO

e. YOUR APPEAL, IF ANY FROM THE JUDGMENT OF CONVICTION OR THE IMPOSITION OF SENTENCE? ☐ YES ☒ NO

f. PREPARATION, PRESENTATION OR CONSIDERATION OF ANY PETITIONS, MOTIONS OR APPLICATIONS WITH RESPECT TO THIS CONVICTION, WHIC YOU FILED? ☐ YES ☒ NO

(11) IF YOU ANSWER "YES" TO ONE OR MORE PARTS OF (10), LIST

[illegible] AND ADDRESS OF EACH ATTORNEY WHO REPRESENTED YOU:

James D. McMullin, 1125 Grand Ave. Suite 818, Kansas City, MO 64106
Robert Calbi, 912 Baltimore, Suite 400, Kansas City, MO

(12) THE PROCEEDINGS AT WHICH EACH SUCH ATTORNEY REPRESENTED YOU:

Mr. McMullin; C and D, above in Section 15
Mr. Calbi; B, above in Section 15

(13) ARE YOU NOW UNDER SENTENCE FROM ANY OTHER COURT THAT YOU HAVE NOT CHALLENGED? ☐ YES ☒ NO

(14) IF YOU ARE SEEKING TO PROCEED *IN FORMA PAUPERIS*, HAVE YOU COMPLETED THE SWORN AFFIDAVIT SETTING FORTH THE REQUIRED INFORMATI SEE INSTRUCTIONS, PAGE 1 OF THIS FORM)? ☒ YES ☐ NO

SIGNATURE OF MOVANT

~~RENON M. LEE~~ Renon Lee

, movant in this case, being duly sworn upon my oath state that I ha subscribed to the foregoing petition; that I know the contents thereof; that the above information is, to the best of my knowledge, true and correct; th I have listed every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that I understa that I waive any ground for relief known to me that I have not listed in this motion.

SIGNATURE OF MOVANT Renon Lee

[illegible] NOTARY SEAL	STATE OF MISSOURI	COUNTY (OR CITY OF ST. LOUIS) Washington	ON THIS 17 DAY OF November 94
	NAME OF NOTARY (PRINT OR TYPE) Sherry Lynn Wise		A NOTARY PUBLIC IN AND FOR SAID STA PERSONALLY APPEARED
	NAME OF INDIVIDUAL (PRINT OR TYPE) Renon Lee		KNOWN TO ME TO BE THE PERSON W EXECUTED THE WITHIN
	TYPE OF DOCUMENT 2.15	AND ACKNOWLEDGE TO ME THAT HE/SHE EXECUTED THE SAME THE PURPOSES THEREIN STATED	
	NOTARY PUBLIC SIGNATURE Sherry Lynn Wise		
	MY COMMISSION EXPIRES Dec 23, 1997	USE RUBBER STAMP HERE	SHERRY LYNN WISE Notary Public - Notary Seal STATE OF MISSOURI Washington County My Commission Expires: December 23, 1997

[illegible] 1347 (7-90)

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FORMA PAUPERIS AFFIDAVIT

Movant deposes and says that he is a poor person within the meaning of the law; THAT he owns no stocks, bonds, cars, cash, or real estate to secure the [illegible] this action.

Kemon Lee

I, KEMON H. LEE, being first duly sworn upon my oath, depose and say that I have subscribed the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

SIGNATURE OF AFFIANT

Kemon Lee

NOTARY PUBLIC EMBOSSER SEAL

STATE OF MISSOURI

COUNTY (OR CITY OF ST. LOUIS)

Washington

SUBSCRIBED AND SWORN BEFORE ME, THIS 11 DAY OF November 1994

NOTARY PUBLIC SIGNATURE

Sherry Lynn Wise

MY COMMISSION EXPIRES

Dec 23, 1997

USE RUBBER STAMP IN CLEAR AREA BELO

NOTARY PUBLIC NAME (TYPED OR PRINTED)

Sherry Lynn Wise

SHERRY LYNN WISE
Notary Public - Notary Seal
STATE OF MISSOURI
Washington County
My Commission Expires: December 23, 1997

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STATE OF MISSOURI)
) SS
COUNTY OF WASHINGTON)

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON, MISSOURI, STATE OF MISSOURI

REMON M. LEE,

nt,

vs.*Mova*

STATE OF MISSOURI,

Respondent.

VERIFIED REQUEST FOR EVIDENTIARY HEARING

Comes now Remon M. Lee movant in the above entitled cause of action, and consistent with Missouri Supreme Court Rules would make a request for an evidentiary hearing on the pending 29.15 Motion (State whether 29.15 or 24.035. hearings are granted under Rule 24.035(g) and Rule 29.15(g) on on written request verified prior to the amended motion being filed. The court then has 15 days to decide whether a hearing is required). The movant in this case request an evidentiary hearing on the following issues:

a. all issues contained in the original motion and the amended motion.

Additional hearing is required on:

The disqualification of the judge from presiding over this cause of action as it is reasonable possible that he may be called to appear as a witness to answer to a number of the submissions made by movant in the attached PCR Motion.

WHEREFORE, movant prays that this motion be sustained.

Respectfully, /s/ Remon M. Lee

I, Remon M. Lee, after first being duly sworn, depose, and swears that he has read the above and the matters therein are true and correct according to his best information, knowledge and belief.

/s/ Sherry Lynn Wise
Notary Public

/s/ Remon Lee
Affiant

Subscribed and sworn to before me this 17 day of November 1994

My Commission Expires: Dec 23, 1997

Proof of Service-----Copies mailed this 17th day of November 1994 to: /s/ Remon Lee

[Filed Jul. 3, 1995]

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CV94-28462

Division 3

REMON M. LEE,

Movant,

vs

State Of Missouri,

Respondent.

FIRST AMENDED APPLICATION FOR POSTCONVICTION RELIEF

CONES NOW MOVANT, Remon N. Lee, by and through undersigned counsel, and pursuant to Rule 29.15, files the following first amended motion for postconviction relief.

BACKGROUND

1. In *State v. Remon N. Lee*, CR93-0453, Movant was convicted after a trial by jury in the Circuit Court of Jackson County of one count of murder in the first degree, Section 565.020, RSMo, and one count of armed criminal action, Section 571.015, RSMo.

2. On April 19, 1994, the Honorable Anthony P. Nugent, Senior Judge, sentenced Movant to concurrent terms of life without parole on the count of murder and ten (10) years imprisonment on the count of armed criminal action.

3. Movant is currently incarcerated at the Potosi Correctional Center in Potosi, Missouri.

4. Movant filed a direct appeal from his conviction in CR93-0453. That appeal is suspended, pending resolution of this Rule 29.15 motion.

5. Movant was represented by Mr. James L. McMullin, 810 Merchants Bank Building, 1125 Grand Avenue, Kansas City, Missouri, 64106, at all times relevant to this motion.

7. Prior to this motion, Movant has not filed any other motions to vacate, petitions for habeas corpus, or petitions for certiorari in this or any other court, challenging his conviction or sentence in CR93-0453.

8. None of the grounds for relief set forth in this motion have been previously presented to this or any other court, state or federal, in any petition, motion, or application.

9. Movant is a poor person, as evidenced by this Court appointing the Office of Appellate Defender, Western District, to represent Movant on his Rule 29.15 motion.

APPLICATION FOR POSTCONVICTION RELIEF

1. Movant was denied his rights to due process of law and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and by the Missouri Constitution, Article I, Sections 10 and 18(a), when:

> a. Movant's alibi witnesses, James Edwards, Gladys Edwards, and Laura Lee were told by an unknown person that they could leave the courthouse because they were not needed to testify. In fact, Laura Lee and James and Gladys Edwards were essential witnesses for Movants defense, because Movant expected them to testify and establish he was visiting his family, including his parents, James and Gladys Edwards, in Ventura, California during the entire month of August, 1992.

The testimony of Laura Lee and James and Gladys Edwards was necessary for Movant's defense, since the state alleged Movant was the get-away driver for Reginald Rhodes in the August 27, 1992, shooting death of Steven Shelby.

As a result of Laura Lee and James and Gladys Edwards being told they were not needed to testify, Lee and the Edwards left the courthouse and were not present when Movant presented his evidence in chief. Defense counsel made a record with Movant that the witnesses had come from California to testify on Movant's behalf, were under subpoena for the defense, had been present in the courthouse that morning, and had left the courthouse sometime around 11:00 a.m. (Tr. 571-577). Defense counsel made an oral motion for continuance, which the trial court overruled (Tr. 579-580). Because his witnesses had left the courthouse under the mistaken impression that their testimony was not needed and therefore could not be found to testify, Movant was denied his rights to present evidence in his defense, to due process of law, and to the effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution. A reasonable probability exists that the result of the trial would have been different had Movant's alibi witnesses been called to testify that Movant was in California during August, 1992.

In support of this allegation, Movant will rely upon the transcripts and entire, court file in CR93-0453, the testimony of Movant, of Laura Lee, of James Edwards, of Gladys Edwards, and of trial counsel James L. McMullin, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

b. The trial court overruled defense counsel's motion for continuance. Laura Lee and James and Gladys Edwards were under subpoena by the defense and had been present in the courthouse on the morning of the last day of trial. While they were waiting to testify, an unknown person approached Lee and the Edwards and told them their testimony would not be needed. Lee and the Edwards left the courthouse and went to a relative's home to await news of the verdict. Although at the time neither counsel nor Movant knew where the alibi witnesses had gone or why they had left the courthouse, Movant had since learned that a person believed to have been employed by the Jackson County Prosecutor's Office told Movant's alibi witnesses that they could leave because their testimony was not needed. Defense counsel made an oral motion for continuance, but the trial court overruled the motion, because the trial judge's daughter was scheduled to have surgery the next morning. The court assumed Movant's alibi witnesses had abandoned Movant, although there was no evidence to indicate why the witnesses had left. Defense counsel did not object to the court's basis for denying the continuance.

Movant was denied his rights to a fair trial, to due process of law, to the effective assistance of counsel, to call witnesses in his defense, and to compulsory process, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution. The actions of the unknown person defeated Movant's right to compulsory process to obtain witnesses in his defense, by circumventing Movant's properly served subpoenas. Movant was denied his rights to due process of law and to a fair trial, because the trial judge elevated his personal interest in his daughter's surgery over Movant's interests in a fair

adjudication of the charges against him. The court assumed Movant's witnesses had abandoned him, and did not even consider that another judge may have been available to preside over what remained of Movant's trial, or that Movant may have been able to locate his witnesses that afternoon. Movant was prejudiced because trial counsel informed the jury during voir dire and opening statement that Movant's defense would be alibi. After defense counsel failed to present any evidence of alibi, the state commented on that fact in its closing argument (Tr. 624). A reasonable probability exists that the result of the trial would have been different had the court granted a brief continuance of te trial, since the jury may have chosen to believe the alibi testimony that Movant was in the state of California at the time Steve Shelby was killed.

In support of this allegation, Movant will rely upon the transcripts and entire court file in CR93-0453, the testimony of Movant and trial counsel James L. McMullin, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

c. Trial counsel James L. McMullin failed to adequatley consult with Movant about testifying on his own behalf at trial, after Movant's alibi witnesses mysteriously disappeared before they could be called to testify. Trial counsel informed Movant and the court he had no choice but to close the defense evidence without presenting the alibi testimony he had promised the jury during voir dire and opening statements. Defense counsel questioned Movant about whether he wanted to testify, but did not ensure that Movant understood that his failure to testify meant he would not be able to present his defense of alibi. Had counsel so advised Movant, Movant would have testified in his own behalf despite his prior convictions, in order to avoid giving up his defense of alibi.

In support of this allegation, Movant will rely upon the transcripts and entire court file in CR93-0453, the testimony of Movant, of trial counsel James L. McMullin, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

d. Trial counsel James L. McMullin failed to object to the trial court submitting the charge of murder in the first degree to the jury under Instruction Number 6, which did not require the jury to find that Movant deliberated in aiding or encouraging Reginald Rhodes to cause the death of Steve Shelby. Movant was charged with murder in the first degree under the theory that he acted with Rhodes in causing Shelby's death. Instruction Number 6 required the jury to find Reginald Rhodes caused the death of Steve Shelby by shooting him, that it was Rhodes' purpose to cause the death of Steve Shelby, that Rhodes killed Shelby after deliberation, and that Movant, with the purpose of promoting or furthering the death of Steve Shelby, aided or encouraged Rhodes in causing Shelby's death and reflected upon the matter coolly and fully.

A first degree murder verdict director premised on accomplice liability must require the jury to find the defendant, charged with aiding or encouraging the accomplice in causing the victim's death, "did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief." MAI-CR3d 304.04, Note on Use 7(b); *State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993). The verdict director in this case only required the jury to find Movant "reflected upon this matter cooly [sic] and fully". The verdict director in this case did not require a finding of deliberation on the part of Movant, and therefore was defective. Trial counsel was ineffective in failing to object to Instruction Number 6, because he allowed the

case to go to the jury under a verdict director which permitted the jury to find Movant guilty without first finding Movant had a culpable mental state. Instruction Number 6 erroneously permitted the jury to impute a finding that Rhodes deliberated to Movant. A reasonable probability exists that the result of the trial would have been different had the jury been required to also find Movant deliberated, since the state's evidence did not establish deliberation by Movant. The state could not prove Movant either deliberated or knew that Rhodes would shoot Shelby when he parked the truck near the place where Shelby was shot. Requiring the jury to find deliberation by Movant may well have resulted in Movant's acquittal or in Movant being found guilty of a lesser offense.

In support of this allegation, Movant will rely upon the transcripts and entire court file in CR93-0453, the testimony of Movant, of trial counsel James L. McMullin, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

e. Trial counsel James L. McMullin failed to object and request a mistrial when Steven Shelby's sister, Rhonda Shelby, testified she saw Movant near the scene of the shooting and in the presence of Reginald Rhodes the day before the shooting. Counsel had not investigated Rhonda Shelby prior to trial, appeared to be surprised at Rhonda Shelby's testimony, and failed to request a continuance or to conduct further investigation. Movant also asserts Rhonda Shelby was only called to testify because state's witness Reginald Williams' testimony was shown to be unreliable.

Movant further asserts that his codefendant Reginald Rhodes should have been called to testify at Movant's trial. Rhodes pleaded guilty to the offenses charged against Movant, and had informed Movant he would be

willing to testify on Movant's behalf to the fact that Movant had no prior knowledge of the offense and was not a willing or knowing participant. A reasonable probability exists that the result of the trial would have been different had counsel called Rhodes to testify, since Rhodes may have provided a defense for Movant.

In support of this allegation, Movant will rely upon the transcripts and entire court file in CR93-0453, the testimony of Movant, of trial counsel James L. McMullin, and of Reginald Rhodes, and upon any other relevant evidence that may be discovered pursuant to reasonable investigation.

2. Movant hereby incorporates by reference, as if fully set forth herein, all allegations of error contained in his *pro se* motion. Movant's *pro se* motion and this amended motion contain all grounds known to Movant at this time for relief from his judgment and sentence. Movant does not waive any claim of which he does not have knowledge after the exercise of due diligence in investigating this case.

3. Movant hereby expressly requests an evidentiary hearing on the claims raised herein.

WHEREFORE, for the foregoing reasons, Movant respectfully requests that this Court grant an evidentiary hearing in this cause and, at the conclusion of such hearing, vacate Movant's convictions and sentences and grant Movant a new trial.

Respectfully submitted,

/s/ Susan L. Hogan
SUSAN L. HOGAN, #33194
Appellate Defender, Western District
Appellate/Postconviction Division
Office of State Public Defender
505 E. 13th Street, Suite 420
Kansas City, Missouri 64106-2865
Tel: 816/889-2029
Counsel for Movant

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed by the courier mail system to the Office of the Prosecuting Attorney, Jackson County Courthouse, Floor 7M, Kansas City, Missouri 64106, on this 3rd day of July, 1995.

/s/ Susan L. Hogan
SUSAN L. HOGAN

VERIFICATION

I, Remon N. Lee, Movant in this case, being duly sworn upon my oath state that I have read the foregoing Amended Motion; that I know the contents thereof; that the above information is, to the best of my knowledge, true and correct; that I have listed every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that I understand that I waive any ground for relief known to me that I have not listed in this motion.

/s/ Remon M. Lee
REMON M. LEE

SUBSCRIBED AND SWORN to before me this 29th day of June, 1995.

/s/ Tamia Lewis
TAMIA LEWIS
Notary Public

Tamia Lewis
Notary Public State Of Missouri
My Commission Exp. Nov. 21, 1998
My Commission Expires:

[SEAL]

[Filed Jul 3 1995]

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI AT KANSAS CITY

CV94-28462
Division 3

REMON E. LEE,

Movant,

vs

STATE OF MISSOURI,

Respondent.

REQUEST FOR A HEARING DATE

COMES NOW Movant, by and through counsel, and requests Court to set a hearing date for Movant's Postconviction Motion. Movant requests that he be permitted to personally at the hearing.

WHEREFORE, Movant requests a hearing.

Respectfully submitted

/s/ Susan L. Hogan
SUSAN L. HOGAN, #33194
Appellate Defender, Western District
Appellate/Postconviction Division
Office of State Public Defender
505 E. 13th Street, Suite 420
Kansas City, Missouri 64106-2865
Tel: 816/889-2029
Counsel for Movant

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed by the courier mail system to the Office of the Prosecuting Attorney, Jackson County Courthouse, Floor 7M, Kansas City, Missouri 64106, on this 3rd day of July, 1995.

/s/ Susan L. Hogan
SUSAN L. HOGAN

[SEAL]

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Case No. CV94-028462
Division 3

REMON M. LEE,
Movant,

v.

STATE OF MISSOURI,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having reviewed and considered the pleadings and record on file in the hereinabove-styled and numbered cause, finds and concludes that Movant's Request for Evidentiary Hearing and Pro Se and Amended Applications for Post-conviction Relief pursuant to Missouri Supreme Court Rule 29.15, should be and are hereby overruled, and further makes Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. On February 24, 1994, in *State of Missouri v. Remon M. Lee*, CR93-0453, a jury found Movant guilty of one count of murder in the first degree, Mo. Rev. Stat. § 565.020 (1978), and one count of armed criminal action, Mo. Rev. Stat. § 571.015 (1978), in the Circuit Court of Jackson County, Missouri, before the Honorable Anthony P. Nugent, Senior Judge.

2. On April 19, 1994, Judge Nugent sentenced Movant to life without parole on the count of murder in the first degree and ten (10) years imprisonment on the count of armed criminal action, to be served concurrently in the Missouri Department of Corrections.

3. Mr. James L. McMullin, 810 Merchants Bank Building, 1125 Grand Avenue, Kansas City, Missouri, 64106, represented Movant at trial.

4. On April 19, 1994, Movant filed a direct appeal from his conviction in CR93-0453 with the Missouri Court of Appeals-Western District. The Court of Appeals has suspended the appeal, pending resolution of this motion for post-conviction relief.

5. On April 26, 1994, correction officials delivered Movant to the Fulton Reception and Diagnostic Center, Fulton, Missouri. Fulton officials subsequently transferred Movant to the Potosi Correction Center, Mineral Point, Missouri.

6. On October 26, 1994, Movant filed his record on appeal with the Missouri Court of Appeals-Western District.

7. On November 17, 1994, Movant filed his pro se motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15.

8. On May 2, 1995, the Court appointed the Appellate Defender-Western District to represent Movant in his post-conviction relief effort.

9. On July 3, 1995, Susan L. Hogan, newly appointed attorney for Movant, filed an amended motion for post-conviction relief. The Court had previously granted a thirty (30) day extension to file such motion.

10. On July 13, 1995, Respondent filed suggestions in opposition to Movant's pro se and amended motions.

CONCLUSIONS OF LAW

AMENDED MOTION

1. In order to prevail on a claim of ineffective assistance of counsel, Movant must establish, by a preponderance of the evidence, (1) that defense attorney's performance was deficient, *i.e.* that he failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under the circumstances, and (2) that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc 1984). Prejudice exists only where Movant can show a "reasonable probability" that, but for defense counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687; Harris, 870 S.W.2d at 814.

2. Defense counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 690. In order to overcome this presumption of competency and prevail on a claim of ineffective assistance of counsel, Movant bears the burden of showing that defense counsel's performance was deficient and that his deficient performance prejudiced the defense. *Id.* at 687. Further, this showing must be made by a preponderance of the evidence. *Jackson v. State*, 672 S.W.2d 367, 368 (Mo. App. 1984).

3. Movant's initial allegation of ineffective assistance of counsel makes reference to an incident, wherein defense witnesses, James Edwards, Gladys Edwards and Laura Lee, were reportedly told by an unidentified person that they could leave the courthouse because their testimony was no longer required. If in fact, defense witnesses were so informed, Movant must allege fault on the part of defense attorney in connection with the witnesses' departure. *State v. Twenter*, 818 S.W.2d 628, 637 (Mo. banc 1991). The Movant, who

carries the burden of proof, has failed to show that counsel was in any way responsible for the witnesses' failure to appear and testify.

4. Movant further alleges that he was denied his right to due process of law and to a fair trial because the court erred in overruling defense counsel's motion for a continuance, thereby preventing Movant from locating his witnesses. Trial error is an issue properly raised on direct appeal. An issue which was or should have been raised on direct appeal is not cognizable in a post-conviction relief proceeding. *Stuckey v. State*, 756 S.W.2d 587, 590 (Mo. App. 1988). Even a trial error affecting a constitutional right cannot be litigated in a rule 29.15 motion "except in a rare and exceptional circumstance." *Id.*

5. Finally, Movant claims that he was denied effective assistance when defense counsel failed to object to the court's basis for denying Movant's request for a continuance. Decisions concerning whether or when to make objections at trial are left to the judgment of counsel. *State v. Suarez*, 867 S.W.2d 583, 587 (Mo. App. 1993); *State v. Brasher*, 867 S.W.2d 565, 570 (Mo. App. 1 993). A mere failure to object, by itself, does not amount to ineffective assistance of counsel. *State v. Shurn*, 866 S.W.2d 447, 471 (Mo banc 1993); *State v. Lewis*, 874 S.W.2d 405, 427 (Mo. App. 1993). The fact that a meritorious objection may not have been made does not demonstrate incompetence, rather there must be a showing that counsel's overall performance fell short of established norms and that this incompetence probably affected the result. *State v. Jones*, 885 S.W.2d 57, 58 (Mo. App. 1994); *Jones v. State*, 784 S.W.2d 789, 793 (Mo. banc 1990).

6. Movant's next allegation of ineffective assistance of counsel alleges that defense counsel failed to adequately consult with Movant about testifying on his own behalf. Defense counsel's advice to his client as to whether or not to testify is a matter of trial strategy. *State v. Kennedy*, 842

S.W.2d 937, 945 (Mo. App. 1992); State v. Gray, 812 S.W.2d 935, 940 (Mo. App. 1991). Allegations of ineffective assistance of counsel relating to matters of trial strategy do not provide a basis for post-conviction relief, for counsel is allowed wide latitude in conducting a defense and is entitled to use his best judgment. *Stuckey*, 756 S.W.2d at 593; *State v. Borders*, 844 S.W.2d 49, 54 (Mo. App. 1992).

7. Further, the record does not support Movant's contention that defense counsel failed to properly advise him of his right to testify. See Attached Exhibit A. On the contrary, defense counsel went into great detail in advising Movant about his right to testify. In light of the fact that defense counsel shall take into consideration movant's prior convictions in advising his client whether or not to testify, it would appear that counsel's recommendation to his client was well founded. *Burroughs v. State*, 590 S.W.2d 695, 697 (Mo. App. 1979).

8. Movant next alleges that defense counsel was ineffective in failing to object to the court's submission of the charge of murder in the first degree to the jury under Instruction Number 6. Movant argues that Instruction Number 6 fails to require the jury to find that Movant deliberated in aiding or encouraging Reginald Rhodes to cause the death of Steve Shelby. On the date of Movant's trial, February 22, 1994, Instruction Number 6, or MAI-CR3d 313.02 modified by 304.04, was the proper instruction. The instruction submitted at Movant's trial has been modified, however, the effective date of that modification was October 1, 1994, approximately eight months after Movant's trial. Therefore, any objection that defense counsel could have made, would have been meritless, and counsel is not required to make an objection that is without merit. *State v. Pagano*, 882 S.W.2d 326, 337 (Mo. App. 1994); *State v. Settle*, 670 S.W.2d 7, 13 (Mo. App. 1984).

9. Further, in determining whether counsel is ineffective in assisting his client on the law, the attorney's conduct is

measured by what the law is considered at the time of trial. Defense counsel will not be found ineffective for failing to anticipate changes in the law. *State v. Cunningham*, 863 S.W.2d 914, 921 (Mo. App. 1993); *Felton v. State*, 753 S.W.2d 34, 35 (Mo. App. 1988).

10. Finally, allegations of instructional error are beyond the scope of a motion for post-conviction relief and are proper matters for direct appeal. *State v. Shurn*, 866 S.W.2d 447, 468 (Mo. App. 1993); *Henderson v. State*, 789 S.W.2d 498, 502 (Mo. App. 1990); *Richardson v. State*, 773 S.W.2d 858, 860 (Mo. App. 1989); *Sempsrott v. State*, 784 S.W.2d 198, 201 (Mo. App. 1989).

11. Movant asserts that trial counsel was ineffective in failing to object, request a mistrial, or request a continuance in order to conduct further investigation of Steven Shelby's sister, Rhonda Shelby. The Missouri Supreme Court has stated that, "[o]nly rarely does a court find that failure to interview witnesses is sufficient to justify the finding of ineffective assistance of counsel." *Sanders v. State*, 738 S.W.2d 856, 858 (Mo. banc 1992). Counsel has a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. *Id; Evans v. State*, 759 S.W.2d 858, 859 (Mo. App. 1988). The reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant. *Strickland*, 466 U.S. at 691. When counsel knows generally the facts that support a potential defense, the need for further investigation may be considerably diminished or eliminated altogether. *Id.* In any ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment. *Id.* Movant has failed to show how defense counsel's "lack of investigation" has prejudiced him.

12. Movant's final allegation of ineffective assistance of counsel in his amended motion alleges that defense counsel was ineffective in failing to call Reginald Rhodes to testify. In order to support a claim of ineffectiveness, Movant must prove that his attorney's failure to call the witness was something other than trial strategy. *State v. Carson,* 898 S.W.2d 555, 557 (Mo. App. 1995). Allegations of ineffective assistance of counsel relating to matters of trial strategy do not provide basis for Post-conviction relief, for counsel is allowed wide latitude in conducting a defense and is entitled to use his best judgment. *State v. Williamson,* 877 S.W.2d 258, 262 (Mo. App. 1994). "If an attorney believes that the testimony of an alibi witness would not unqualifiedly support his client's position, it is a matter of trial strategy not to call him to the stand." *Eldzidge v. State,* 592 S.W.2d 738, 741 (Mo. banc. 1979). The selection of witnesses remains a question of trial strategy that is "virtually unchallengeable." *Harris,* 870 S.W.2d at 857; *State v. White,* 870 S.W.2d 869, 875 (Mo. App. 1993).

13. Further, Movant must identify who the witness is, what his testimony would have been, whether or not counsel was informed of his existence, and whether or not he was available to testify. *State v. Dudley,* 819 S.W.2d 51, 56 (Mo. App. 1991). Movant has failed to allege whether counsel was informed or had any knowledge of Reginald Rhodes willingness to testify on Movant's behalf. *State v. Simmons,* 875 S.W.2d 919, 923 (Mo. App. 1994); *Jones v. State,* 773 S.W.2d 156, 159 (Mo. App. 1989). Movant does allege that defense counsel was ineffective for not calling Reginald Rhodes as a witness. Movant concludes that Mr. Rhodes would have testified that Movant had no prior knowledge of the offense and was not a willing or knowing participant in the crime. Movant does not recite what Mr. Rhodes' testimony would have been, nor does he state a basis for his improbable conclusion that Mr. Rhodes was apparently able to read his mind to determine his intent, or lack thereof. *State*

v. Turner, 810 S.W.2d 92, 94 (Mo. App. 1991); *Mathenia v. State,* 752 S.W.2d 873, 876 (Mo. App. 1988).

PRO SE MOTION

14. In his pro se motion, Movant alleges trial counsel's ineffectiveness in failing to object to the giving of Instruction Number 4 at the trial of Movant's case. Movant submits that, in defining proof beyond a reasonable doubt as proof that leaves jurors "firmly convinced," the trial court diminished the meaning of reasonable, thereby violating Movant's right to due process of law as guaranteed by the state and federal constitutions. Missouri courts have continually held that this instruction meets with the constitutional requirement that the jury be instructed that a defendant be proven guilty beyond a reasonable doubt. *Shun,* 866 S.W.2d at 462; *State v. Ervin,* 835 S.W.2d *905,* 926 (Mo. banc 1992); *State v. Griffin,* 818 S.W.2d 278, 282 (Mo. banc 1991). This instruction merely explains the term "reasonable doubt" to the jury and does not equate proof beyond a reasonable doubt with a lesser standard. *Id.* Therefore, any objection that trial counsel could have made, would have been meritless, and defense counsel cannot be deemed ineffective for declining to make a non-meritorious objection. *State v. Pagano,* 882 S.W.2d at 337; *State v. Settle,* 670 S.W.2d at 13.

15. Further, objections to jury instructions are properly raised on direct appeal and are not cognizable in a post-conviction relief proceeding absent exceptional circumstances. *State v. Six,* 805 S.W.2d 159, 168 (Mo. App. 1991); *Roberts v. State,* 775 S.W.2d 92, 96 (Mo. Banc 1989). Movant cannot bring his allegation within the scope of Rule merely by alleging as a conclusion that it affected a constitutional right. *Stuckey,* 756 S.W.2d at 590.

16. Movant's second and final allegation set forth in his pro se motion alleges that he received ineffective assistance of counsel because defense counsel did not submit an alibi

instruction, nor did counsel move to modify the instructions to include MAI-CR.3d 308.04 (1987) or MAI-CR3d 308.06 (1987). Referring back to Movant's amended motion and it's initial allegation of ineffective assistance of counsel, defense witnesses, James Edwards, Gladys Edwards and Laura Lee, failed to appear and testify on Movant's behalf. Therefore, Movant's claim is without merit because there was no evidence of an alibi adduced at trial.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that for the reasons set forth in the attached Findings of Facts and Conclusions of Law, the Court finds Movant's Pro Se and Amended Applications for Post-conviction Relief pursuant to Missouri Supreme Court Rule 29. 15 should be, and are hereby, overruled and dismissed with prejudice.

The Court further finds that an evidentiary hearing is not indicated; that a ruling can be and therefore is made solely from the transcript and pleadings on file and available to the Court.

/s/ Thomas C. Clark
Thomas C. Clark; Judge

Copies of the foregoing were mailed of this 21st day of August, 1995, to:

Linda Koch, Assistant Prosecuting Attorney
Susan Hogan, Assistant Appellate Defender
Pat Higley, Director of Criminal Records Court of Appeals—Western District of Missouri
Sharon Snyder, Clerk of Division 3.

[Filed Aug. 23, 1995] [SEAL]

Exhibit A

Q. All right.

So we don't want to use—you don't want to use the sister in Texas or the girlfriend up here; is that correct?

A. Yes, sir.

Q. All right.

Now, we discussed, did we not, that you have a right to testify and a right not to testify at this trial, didn't we?

A. Yes, sir.

Q. I want to cover a few moments on that, although after the State rests this case we'll take it up again. We discussed it, and I told you all the advantages and disadvantages of testifying, didn't I?

A. Yes, sir.

Q. I told you the advantage was the jurors generally like to hear a guy say, "I didn't do it."

You understand that?

A. Yes.

Q. I told you the disadvantages are if you testified, the State could then get in all your previous convictions; isn't that true?

You understand that?

A. Yes, sir.

Q. And we went over those, I believe you just had assault and armed criminal action, just got 80 years on, and then you had voluntarily manslaughter and you had receiving stolen property; isn't that true?

A. Yes, sir.

Q. And you may have had another one or two, but the jury won't know about those if you don't testify.

You understand that?

A. Yes, sir.

Q. They can't say anything about that. If they did, it's instant error or mistrial.

You understand that?

A. Yes, sir.

Q. You and I discussed it and you told me, did you not, that as of today you don't want to testify in the case.

You understand that?

A. Yes, sir.

Q. Now, did you make that decision on your own?

A. Yes, sir.

Q. Did I threaten you or promise you—or did anyone else threaten you or promise you anything to get you to testify or not testify?

A. No, sir.

Q. You understand whether you testify or not can finally be made after they rest their case before we started ours?

A. Yes, sir.

Q. And you and you alone decide that, not me or anybody else.

You understand that?

A. Yes, sir.

Q. Now, there was a motion in here by your previous lawyer Mr. Calbi—C-a-l-b-i—

A. Yes, sir.

Q.—Robert Calbi; isn't that true?

A. Yes, sir.

Q. Mr. Calbi represented you on that assault case where you were sentenced to 80 years by Judge Ely—E-l-y—isn't that right?

A. Yes, sir.

Q. And then he and his investigator did some investigation in this case, and he realized he was probably going to have to be a witness in it, and he withdrew; isn't that true?

A. Yes, sir.

Q. And he gave me all the discovery that he had, you understand that?

* * * *

Q. All I can do is proceed without them and do the best I can.

Do you understand?

A. Yes, sir.

Q. Is there anything you think you ought to do or want me to do or that I refused to do to try to get them back here during—for this trial?

A. Well, I would like to know if we can get a couple hours' continuance and try to locate them, because it's very valuable to my case.

Q. All right.

I'll ask the Court for that at the proper time.

I suppose we could ask for a capias, and—but if they're from California I don't know.

Anyway—

A. I know in fact they didn't go back to California, sir. I know that.

Q. How do you know that?

A. Because they have some ministering—my stepfather's a minister—to do here tonight and tomorrow night.

Q. Well, getting back—we'll cover that later.

Getting back to this, you still—you understand your rights. You still have a right to testify and a right not to testify?

A. Yes, sir.

Q. And one of the reasons that I recommend you not testify is you were found guilty on an assault case with armed criminal action a month or two ago in a separate case in Jackson County, weren't you?

A. Yes, sir.

Q. And Judge Ely give you 50 years and 8 years to run consecutive on those two, didn't he?

A. Yes, sir.

MS. KOCH-CARROLL: No, 50 and 30.

Q. [BY MR. McMULLIN:] Okay. Fifty and thirty to make it a total of eighty years?

A. Yes, sir.

Q. And you have several other felony convictions; isn't that true?

A. Yes, sir.

Q. And you understand—I told you if you get on the stand and testify, they could get—they can introduce those to the jury. But if you don't testify, this jury won't know about it.

You understand that?

A. Yes, sir.

Q. And the judge has given an instruction or approved an instruction he going to give, he's indicated, that says the fact that you do not testify cannot be used as evidence against you.

You understand that?

A. Yes, sir.

Q. So do you want to testify or not testify?

A. No, sir.

Q. Again, out of an abundance of caution, do you understand, sir, that if you're convicted tomorrow or next year or the year after, and you try to come back and say, "Well, hey, I wanted to testify and McMullin wouldn't let me or somebody threatened me or they lied to me," you're not going to get anywhere.

You understand that?

A. Yes, sir.

Q. All right.

MR. McMULLIN: Your Honor, I have no further questions of this witness.

THE COURT: All right.

I think you've made a good record with respect to his rights and his right to testify or not. And you've made—well, do you intend to file a motion for a continance?

MR. McMULLIN: He's asked for one,

* * * *

WD #49456

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

v.

REMON M. LEE,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit

The Honorable Anthony P. Nugent, Senior Judge (Trial)
The Honorable Thomas C. Clark, Judge of
Division 3 (PCR)

Remon Lee v. Mike Kemna
No. 980074-CV-W-8-P
Respondent's Exhibit 7

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This is a consolidated appeal pursuant to Rule 29. 15(1)[1]. Appellant, Remon Lee, was convicted after a trial by jury in the Circuit Court of Jackson County of one count each of murder in the first degree, Section 565.020, RSMo 1994, and armed criminal action, Section 571.015, RSMo 1994. The Honorable Anthony P. Nugent, Senior Judge, sentenced Appellant to concurrent terms of life imprisonment without parole on the count of murder in the first degree and ten years imprisonment on the count of armed criminal action. Appellant also appeals the denial, without an evidentiary hearing, of his Rule 29.15 motion for postconviction relief by the Honorable Thomas C. Clark, Judge of Division 3.

This appeal does not involve any matters reserved for the exclusive jurisdiction of the Missouri Supreme Court, therefore, jurisdiction over this cause lies with the Missouri Court of Appeals, Western District. Mo. Const., Article V, Section 3 (as amended 1982); Section 477.070, RSMo 1994.

STATEMENT OF FACTS

Appellant, Remon Lee, was charged by information in lieu of indictment filed in the Circuit Court of Jackson County with one count of murder in the first degree, Section 565.020, RSMo 1994, and one count of armed criminal action, Section 571.015. RSMo 1994 (L.F. 5-6). The case was tried before a jury beginning on. February 22, 1994 (L.F. 41; Tr. 2). Evidence adduced at trial favorable to the verdict was as follows.

On the afternoon of August 27, 1992, Reginald Williams, then age 18, and his friend, William Sanders, then age 15, were trying to start a moped in a yard between 67th Street and 68th Street on Monroe in Kansas City (Tr. 205-206, 260, 384-385, 391, 397). While they were there, an older model rusty

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[1]Missouri Rules of Court, 1995 edition.

orange or red and white truck drove up the street, headed south on Monroe (Tr. 207, 209, 386). The driver was the only person in the truck (Tr. 211-212).

The truck pulled into a driveway and turned around (Tr. 208-209, 210, 386). The truck drove very slowly back down the street, headed north (Tr. 212, 268-269, 386-387, 388). As the truck headed north, it passed Williams and Sanders again (Tr. 212). The driver stared at Sanders and Williams for about ten seconds while they tried to start the moped (Tr. 212-213, 386, 398-400).

The truck parked in front of a tan Cadillac on Monroe and stayed there for about 30 minutes (Tr. 213, 388, 400). Eventually a blue 1965 Chevy Nova came around the corner, carrying a driver and one passenger (Tr. 215-216, 378, 389). The car stopped directly across from the truck and the passenger jumped out and went around to the front of the car (Tr. 214-215, 390, 400-401). The passenger fired six or seven shots into the driver's side of the blue car and then ran behind the red truck and jumped in the passenger side of the truck (Tr. 215, 217-218, 390, 401). After the passenger got in, the truck sped off, leaving tire tracks in the street (Tr. 220, 390, 401).

Steve Shelby, the driver of the Nova, died of penetrating injuries to the brain caused by gunshot wounds (Tr. 378, 436-437). Shelby sustained a total of nine gunshot wounds, including two on the top of his left shoulder and seven to the left side of his head and neck (Tr. 437). Two slugs were recovered from Shelby's left shoulder (Tr. 437). Gunpowder stippling very finely distributed over the left side of Shelby's head indicated the wounds were inflicted at close range (Tr. 437, 438-439). Seven bullets and nine shell casings recovered from the scene were all fired from the same .9 millimeter caliber semiautomatic weapon (Tr. 199-200, 438). No gun was ever recovered (Tr. 383).

Later that day, Williams picked Appellant's photograph out of a photographic lineup and identified him as looking like the driver of the truck (Tr. 226-227, 355-356). Williams later identified Appellant as the driver after viewing two videotaped lineups (Tr. 208-209, 229-232, 365-366, 369-372). Williams could not identify anyone as the shooter (Tr. 356, 372-374).

William Sanders also viewed a photographic lineup on August 27, 1992, and identified Reginald Rhodes as the shooter (Tr. 357, 393-394, 411). Prior to trial, Sanders made no identification of Appellant or anyone else as the driver of the truck (Tr. 359), however, at trial Sanders claimed he could identify Appellant as the driver (Tr. 414-415).

Shelby's sister, Rhonda Shelby, saw Appellant and Reginald Rhodes together near a red truck behind her duplex at 6621 Askew in Kansas City around 8:00 p.m. on August 26, 1992 (Tr. 443-445, 452-453, 455-456). Rhodes's aunt was one of Rhonda Shelby's neighbors (Tr. 455). Later that night, Reginald Rhodes asked Rhonda about her brother (Tr. 445).

Lynne Bryant lived at 6623 Askew on August 26, 1992 (Tr. 471). Bryant saw Appellant and Rhodes outside her duplex that evening; Appellant had an old orange truck and Rhodes asked Bryant if she had seen Steve Shelby (Tr. 472-473, 478).

Appellant's prior counsel, Robert Calbi, and Fred Macon, an investigator who worked with Calbi, testified on Appellant's behalf that Reginald Williams gave Calbi a statement on April 23, 1993, in which Williams claimed he could not see the driver of the car well enough to identify him (Tr. 503-505, 510-514, 519-520, 525, 547-566). Following Calbi's testimony, the court adjourned for the lunch recess (Tr. 570-571).

When the proceedings returned to the record following the noon recess on February 24, 1994, defense counsel put

Appellant on the witness stand to make a record regarding Appellant's right to testify (Tr. 572-573). In the course of the questioning, counsel developed the fact that Appellant's mother, Gladys Edwards, stepfather, James Edwards, and sister, Laura Lee, had come from California to testify for Appellant (Tr. 573-574). Defense counsel had met with these witnesses on February 21, 1994, and had served each of them with a subpoena (Tr. 574, 576, 580-581). Ms. Lee and Mr. and Mrs. Edwards were at the courthouse from 8:30 until about 11:00 a.m. on February 24, 1994 (Tr. 574-576). By the afternoon session, Ms. Lee and Mr. and Mrs. Edwards were gone and could not be found (Tr. 575-577). Appellant and counsel did not know why they had left (Tr. 576). Although defense counsel claimed, "[T]here's nothing I can do if they're not here" (Tr. 576), Appellant asked counsel to request a continuance for "a couple hours" to try to locate his witnesses (Tr. 577). Appellant told counsel he knew his parents had not returned to California because they had a religious activity planned that evening in Kansas City (Tr. 577).

Defense counsel moved for a continuance at Appellant's request (Tr. 579-580). Although the alibi witnesses were Appellant's sister, mother, and stepfather who had come from California voluntarily to testify for Appellant, the trial court overruled the continuance motion (Tr. 573-575, 580, 584). In overruling the motion, the court assumed Appellant's family members had abandoned him (Tr. 582-584). In response to defense counsel's request to adjourn until the next morning, the court stated, "[M]y daughter is going to be in the hospital all day. . . . So I've got to stay with her. . . . it's too bad. The Court will not be able to be here tomorrow to try the case." (Tr. 580, 583). Appellant called no further witnesses (Tr. 590).

The trial court overruled Appellant's motions for judgment of acquittal at the close of the state's evidence and at the close

of all the evidence (L.F. 43-44, 45-46; Tr. 489, 490-491, 591). The jury found Appellant guilty of murder in the first degree and armed criminal action (L.F. 34, 36; Tr. 626-627). On April 19, 1994, the Honorable Anthony P. Nugent, Senior Judge, sentenced Appellant to concurrent terms of life imprisonment without parole on the count of murder in the first degree and thirty years imprisonment on the count of armed criminal action (L. F. 58; Sent. Tr. 1 , 2, 8).

On November 21, 1994, Appellant timely filed a *pro se* motion for postconviction relief pursuant to Rule 29.15 (PCR L.F. 1-2, 3-14). This motion was amended by appointed postconviction counsel, who also requested an evidentiary hearing (PCR L.F. 15, 16, 17-18, 19, 20-30, 31). Appellant's motions alleged, *inter alia* that Appellant received ineffective assistance of trial counsel 1) when trial counsel failed to call Appellant's codefendant Reginald Rhodes to testify on Appellant's behalf at trial, and 2) when the trial court overruled Appellant's motion for continuance after Appellant's alibi witnesses mysteriously disappeared from the courthouse before they could be called to testify (PCR L.F. 21-25, 27-28). On August 21, 1995, the Honorable Thomas C. Clark, Judge of Division 3, issued findings of fact and conclusions of law overruling Appellant's motion without granting an evidentiary hearing (PCR L.F. 32-46). Appellant filed a timely notice of appeal on October 2, 1995 (PCR L.F. 48), and this appeal follows.

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR CONTINUANCE FROM THE AFTERNOON OF FEBRUARY 24, 1994, UNTIL THE NEXT MORNING, AFTER APPELLANT'S SUBPOENAED ALIBI WITNESSES MYSTERIOUSLY DISAPPEARED FROM THE COURTHOUSE BEFORE TESTIFYING, BECAUSE THE DENIAL OF THE CONTINUANCE VIOLATED

APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO PRESENT WITNESSES IN HIS DEFENSE, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT THE TESTIMONY OF THE MISSING ALIBI WITNESSES WAS VITAL, MATERIAL, AND RELEVANT TO APPELLANT'S DEFENSE, THE CONTINUANCE REQUESTED BY COUNSEL WAS REASONABLE UNDER THE CIRCUMSTANCES, AND THE TRIAL COURT'S REASONS FOR DENYING THE CONTINUANCE HAD NOTHING TO DO WITH THE CASE ITSELF, BUT RATHER WITH THE COURT'S PERSONAL SCHEDULE.

State v. Fuller, 837 S.W.2d 304 (Mo. App. 1992);

State v. Lachterman, 812 S.W.2d 759 (Mo. App. 1991);

State v. Reece, *505* S.W.2d 50 (Mo. 1974);

State v. Davis, 625 S.W.2d 903 (Mo. App. 1981);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Sections 10 and 18(a); and

Missouri Supreme Court Rule 24.10.

POINT II

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S RULE 29.15 MOTION FOR POSTCONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING, BECAUSE THE RECORD LEAVES THE FIRM CONVICTION THAT A MISTAKE HAS BEEN MADE, IN THAT APPELLANT HAS ALLEGED FACTS, NOT CONCLUSIONS, WHICH IF TRUE WOULD ENTITLE HIM TO RELIEF, AND WHICH

ARE NOT REFUTED BY THE RECORD, IN THAT APPELLANT HAS ALLEGED THAT TRIAL COUNSEL FAILED TO EXERCISE THE CUSTOMARY SKILL AND DILIGENCE A REASONABLY COMPETENT ATTORNEY WOULD EXERCISE UNDER THE SAME OR SIMILAR CIRCUMSTANCES, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, WHEN TRIAL COUNSEL 1) FAILED TO CALL APPELLANT'S CODEFENDANT REGINALD RHODES TO TESTIFY ON APPELLANT'S BEHALF THAT APPELLANT WAS NOT INVOLVED IN THE SHOOTING DEATH OF STEVE SHELBY, AND 2) THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S MOTION FOR CONTINUANCE AFTER APPELLANT'S ALIBI WITNESSES MYSTERIOUSLY DISAPPEARED FROM THE COURTHOUSE AFTER SOME UNKNOWN PERSON TOLD THEM THEIR TESTIMONY WAS NOT NEEDED.

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 752, 9 L.Ed.2d 799 (1963);
Powell v. Alabama, 287 U.S. *45*, 53 S.Ct. 55, 77 L.Ed. 158 (1932);
Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972);
Thomas v. State, 516 S.W.2d 761 (Mo. App. 1974);
Eldridge v. Atkins, *665* F.2d 228 (8th Cir. 1981), *denied*, 456 U.S. 910 (1982);
Owens v. State, 596 S.W.2d 480 (Mo. App. 1981);
Henderson v. Sergeant, 926 F.2d 706 (8th Cir. 1991);
Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990);
Porter v. State, 596 S.W.2d 706 (Mo. App. 1982);
State v. Vinson, 800 S.W.2d 444 (Mo. banc 1990);
Perkins-Bey v. State, 735 S.W.2d 170 (Mo. App. 1987);
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
Seales v. State, 580 S.W.2d 733 (Mo. banc 1979);
Love v. State, 670 S.W.2d 499 (Mo. banc 1984);
State v. Schaal, 806 S.W.2d 659 (Mo. banc 1991);
State v. Carey, 808 S.W.2d 861 (Mo. App. 1991);
State v. Watson, 806 S.W.2d 677 (Mo. App. 1991);
U.S. Const., Amends. VI and XIV;
Mo. Const., Article I, Sections 10 and 18(a); and
Missouri Supreme Court Rule 29.15.

ARGUMENT I

THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR CONTINUANCE FROM THE AFTERNOON OF FEBRUARY 24, 1994, UNTIL THE NEXT MORNING, AFTER APPELLANT'S SUBPOENAED ALIBI WITNESSES MYSTERIOUSLY DISAPPEARED FROM THE COURTHOUSE BEFORE TESTIFYING, BECAUSE THE DENIAL OF THE CONTINUANCE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO PRESENT WITNESSES IN HIS DEFENSE, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT THE TESTIMONY OF THE MISSING ALIBI WITNESSES WAS VITAL, MATERIAL, AND RELEVANT TO APPELLANT'S DEFENSE, THE CONTINUANCE REQUESTED BY COUNSEL WAS REASONABLE UNDER THE CIRCUMSTANCES, AND THE TRIAL COURT'S REASONS FOR DENYING THE CONTINUANCE HAD NOTHING TO DO WITH THE CASE ITSELF, BUT RATHER WITH THE COURT'S PERSONAL SCHEDULE.

The trial court abused its discretion in overruling Appellant's motion for a continuance to obtain the trial testimony of Gladys Edwards, James Edwards, and Laura Lee. The testimony of Laura Lee and of Mr. and Mrs. Edwards was vital, material, and relevant to the merits of Appellant's case, and the denial of the continuance to seek their testimony prejudiced Appellant. The witnesses had been subpoenaed by defense counsel and were present in the courthouse during the morning of the third day of trial. When their turn came to testify that afternoon, the witnesses were no longer in the courthouse and could not be located. Appellant had expected

Ms. Lee and Mr. and Mrs. Edwards to provide him with an alibi. The trial court's denial of the requested continuance denied Appellant's state and federal constitutional rights to due process of law and to present witnesses in his defense.

Defense counsel served subpoenas on potential defense witnesses Laura Lee and Gladys and James Edwards on Monday, February 21, 1994, prior to the start of trial (Tr. 573-575, 576, 580-581). Ms. Lee is Appellant's sister and Mr. and Mrs. Edwards are his mother and stepfather (Tr. 573-574). All three live in Ventura, California, and came to Kansas City, Missouri voluntarily to testify on Appellant's behalf (Tr. 195-197, 573-575, 580). During opening statement, defense counsel told the jury he expected Ms. Lee and Mr. and Mrs. Edwards to testify that Appellant visited them in Ventura, California from mid-July, 1992, until late October, 1992 (Tr. 195-197). Following the close of the state's case, defense counsel called Robert Calbi and Fred Macon to testify regarding a statement given to Calbi by state's witness Reginald Williams (Tr. 503-505, 510-514, 519-520, 525, 547-566). Following Calbi's testimony, the court declared a luncheon recess (Tr. 570-571).

When court reconvened for the afternoon, defense counsel made a record that Ms. Lee and Mr. and Mrs. Edwards had been in the courthouse earlier in the day and had mysteriously disappeared (Tr. 572-584). At Appellant's urging, counsel requested a continuance until the next morning, so that the witnesses could be located and called to testify (Tr. 576-577, 579-580). The court assumed Appellant's family had abandoned him after coming all the way from California to testify on his behalf (Tr. 573-575, 580, 582-584). When counsel requested that the cause be adjourned for the day and the jury directed to return in the morning, the court stated, "[M]y daughter is going to be in the hospital all day. . . . So I've got to stay with her. . . . it's too bad. The Court will not be able to be here tomorrow to try the case. " (Tr. 580, 583).

The Court also informed the parties he had another trial starting the following Monday, so the case could not be continued until then (Tr. 583).

The court overruled the motion for continuance and the case was submitted to the jury without the alibi testimony of Laura Lee and Gladys and James Edwards (Tr. 590). During closing argument, defense counsel apologized for the absence of alibi testimony (Tr. 619). The state argued Appellant "no doubt" was in town on August 26 and 27, 1992, based on the lack of alibi testimony (Tr. 624). The jury upon its deliberations found Appellant guilty of murder in the first degree and armed criminal action (L.F. 34, 36; Tr. 626-627).

A ruling on a motion for a continuance is a matter resting in the discretion of the trial court, and such a decision will not be reversed absent a strong showing of abuse. *State v. Fuller*, 837 S.W.2d 304, 307 (Mo. App. 1992). The party requesting the continuance bears the burden of showing both an abuse of discretion and prejudice stemming from the denial of the continuance. *Id.* When the request for a continuance is based upon the absence of a witness, the trial court may consider the probability of whether the witness will be found. *Id.*, citing *State v. Lachterman*, 812 S.W.2d 759, 763 (Mo. App. 1991). The trial court will not be found to have abused its discretion if the continuance probably would not have resulted in the presence of the witness at trial. *Fuller*, 837 S.W.2d at 307. To warrant reversal on appeal, the appellant must show that it is reasonably probable that the witness's testimony would change the outcome of the trial. *Id.*, citing *State v. Reece*, 505 S.W.2d 50, 52 (Mo. 1974); *State v. Davis*, 625 S.W.2d 903, 905 (Mo. App. 1981).

The trial court clearly abused its discretion in overruling Appellant's motion for a continuance to locate Laura Lee and James and Gladys Edwards. Each of these witnesses were essential to Appellant's defense, because they would have provided Appellant with a defense of alibi. Defense counsel

informed the jury that the Edwards and Ms. Lee would testify that Appellant was in Ventura, California on August 27, 1992 (Tr. 195-197). Evidence that Appellant was not even in Kansas City at the time of the shooting was material to Appellant's defense, because the identification testimony of Reginald Williams and William Sanders was weak. Although Reginald Williams originally identified Appellant as the driver of the truck, Williams later cast doubt on that identification in an interview with Appellant's first attorney, Robert Calbi (Tr. 208-209, 226-232, 355-356, 365-366, 369-372, 503-505, 510-514, 519-520, 525, 547-566). Although William Sanders claimed at trial that he could identify Appellant as the driver of the truck, Sanders had never identified Appellant or anyone else as the driver prior to trial (Tr. 359, 414-415). Because the identification testimony of Williams and Sanders was weak, any evidence defense counsel could present that Appellant was not even in town at the time of the shooting would have had a significant impact on the jury's deliberations and very well could have resulted in Appellant's acquittal.

The record clearly reflects trial counsel's diligence in locating and bringing in Laura Lee and Mr. and Mrs. Edwards to obtain their testimony for Appellant's trial. All three potential witnesses came voluntarily to Kansas City from their homes in California (Tr. 573-575, 580). Even though the witnesses came to Kansas City voluntarily, defense counsel had them come to his office so he could serve them with subpoenas directing them to appear to testify on February 24, 1994 (Tr. 574, 576, 580-581). Ms. Lee and Mr. and Mrs. Edwards came to the courthouse as directed and were present in the courthouse on the morning of February 24, 1994, although they could not be found that afternoon (Tr. 574-576).

Despite the absence of the witnesses at the time counsel wanted to call them to testify, a reasonable probability existed

that the witnesses could have been found had the court granted a short continuance for the purpose of locating the witnesses. All three witnesses had been served with subpoenas and they were in the State of Missouri voluntarily for the express purpose of testifying on Appellant's behalf (Tr. 573-575, 580). The fact that they had disappeared from the courthouse came as a surprise to both defense counsel and Appellant (Tr. 576). Appellant informed the court that he knew they still had to be in town because they had a religious function to attend that night (Tr. 577). Ms. Lee and Mr. and Mrs. Edwards were staying with relatives (Tr. 573-575), and Appellant's girlfriend had been trying to find them when the court overruled the motion for continuance (Tr. 576). The probability of actually locating Ms. Lee and Mr. and Mrs. Edwards and getting them into the courtroom weighed heavily in Appellant's favor. The trial court ignored the circumstances under which the witnesses came to Kansas City in overruling the continuance motion. The court simply assumed, without conducting further investigation or affording counsel the opportunity to do so, that Appellant was abandoned by his own family members just two or three hours before they were expected to testify on Appellant's behalf (Tr. 582-584).

Appellant was clearly prejudiced by the court overruling his motion for continuance. In the absence of his alibi witnesses, Appellant was forced to close his evidence without presenting the affirmative defense evidence of alibi that his trial attorney had promised the jury in opening statement (Tr. 195-197, 590). Appellant was forced to decide again whether or not to testify on his own behalf (Tr. 572-579). Appellant chose not to testify, which prevented his prior convictions from being placed before the jury, but which kept the jury from hearing that Appellant was in Ventura, California on August 27, 1992, the date Steve Shelby was shot.

Particularly troubling about the trial court's decision to overrule the motion for continuance is the reason for the court's ruling. The trial court informed the parties that the case could not be continued because the trial judge's daughter was to be hospitalized all day the next day, and "it's too bad. The Court will not be able to be here tomorrow to try the case" (Tr. 580, 583). With all respect and sympathy for the trial court's predicament as a parent, the fact remains that Appellant was on trial for murder in the first degree, facing life imprisonment without possibility of probation or parole, and his witnesses unexpectedly and inexplicably disappeared just shortly before they were to testify on his behalf. There was no indication of malfeasance or misfeasance on the part of Appellant or his witnesses. The trial court made no effort to resolve the matter by giving defense counsel even a short time to attempt to locate the witnesses, nor did he attempt to find another judge to preside over the remainder of Appellant' trial if it should carry over to the next day. Despite the trial court's understandable concerns as a parent, Appellant had equally very compelling concerns about having a fair trial, presenting witnesses in his defense, and having his liberty interests adequately protected. The trial court at the very least should have granted a continuance of a few hours, instead of simply overruling the continuance motion and forcing Appellant to close his case without presenting the very heart of his defense. The trial court certainly abused its discretion when it overruled Appellant's motion for continuance on the basis of the court's scheduling concerns, which were entirely unrelated to Appellant's case.

The trial court abused its discretion and Appellant truly was prejudiced when the court overruled Appellant's motion for a continuance. Appellant therefore respectfully requests that this Court reverse his convictions and sentences and remand this cause for a new trial.

ARGUMENT II

THE MOTION COURT CLEARLY ERRED IN DENYING APPELLANT'S RULE 29.15 MOTION FOR POSTCONVICTION RELIEF WITHOUT GRANTING AN EVIDENTIARY HEARING, BECAUSE THE RECORD LEAVES THE FIRM CONVICTION THAT A MISTAKE HAS BEEN MADE, IN THAT APPELLANT HAS ALLEGED FACTS, NOT CONCLUSIONS, WHICH IF TRUE WOULD ENTITLE HIM TO RELIEF, AND WHICH ARE NOT REFUTED BY THE RECORD, IN THAT APPELLANT HAS ALLEGED THAT TRIAL COUNSEL FAILED TO EXERCISE THE CUSTOMARY SKILL AND DILIGENCE A REASONABLY COMPETENT ATTORNEY WOULD EXERCISE UNDER THE SAME OR SIMILAR CIRCUMSTANCES, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, WHEN TRIAL COUNSEL 1) FAILED TO CALL APPELLANT'S CODEFENDANT REGINALD RHODES TO TESTIFY ON APPELLANT'S BEHALF THAT APPELLANT WAS NOT INVOLVED IN THE SHOOTING DEATH OF STEVE SHELBY, AND 2) THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S MOTION FOR CONTINUANCE AFTER APPELLANT'S ALIBI WITNESSES MYSTERIOUSLY DISAPPEARED FROM THE COURTHOUSE AFTER SOME UNKNOWN PERSON TOLD THEM THEIR TESTIMONY WAS NOT NEEDED.

The motion court clearly erred in denying Appellant's Rule 29.15 motion for postconviction relief without granting an evidentiary hearing, because Appellant has alleged sufficient facts, not conclusions, which are not refuted by the record and

which if proven to be true would entitle him to relief. Appellant has asserted that trial counsel did not act as a reasonably competent attorney in his representation of Appellant when he failed to call Appellant's codefendant Reginald Rhodes to testify on Appellant's behalf. Appellant has also alleged that trial counsel was rendered ineffective by the trial court's ruling on defense counsel's motion for continuance, after Appellant's alibi witnesses mysteriously disappeared from the courthouse shortly before being called to testify on Appellant's behalf.

Appellate review of a hearing court's decision in a Rule 29.15 proceeding is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. Rule 29.15(j). A hearing court's actions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. *State v. Schaal*, 806 S.W.2d 659, 667 (Mo. banc 1991). A postconviction movant is entitled to an evidentiary hearing if one is requested and if 1) he alleges facts which would warrant relief if found to be true; 2) the allegations are not refuted by the record; and 3) the movant was prejudiced by the errors. *State v. Carey*, 808 S.W.2d 861, 867 (Mo. App. 1991); *State v. Watson*, 806 S.W.2d 677, 680 (Mo. App. 1991); Rule 29.15(g).

The right to the effective assistance of counsel is mandated by the Sixth Amendment to the United States Constitution and is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 752, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). In order to have his conviction set aside, Appellant must show that trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the

existing circumstances, and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Seales v. State*, 580 S.W.2d 733, 736-737 (Mo. banc 1979). In order to show prejudice, Appellant must demonstrate that counsel's omissions had a material effect, deleterious to him, on the outcome of the trial. *Love v. State*, 670 S.W.2d 499, 503 (Mo. banc 1984).

Appellant has alleged facts, not conclusions, which 1) would warrant relief, 2) are not refuted by the record, and 3) have caused him prejudice. Appellant is therefore entitled to an evidentiary hearing on his Rule 29. 15 motion.

The record reflects that Reginald Rhodes pleaded guilty to the shooting death of Steve Shelby prior to the date of Appellant's trial (Sent. Tr. 14-15). Appellant alleged at his sentencing hearing and in his motions for postconviction relief that he wanted Rhodes to testify on his behalf at trial and that he told defense counsel that Rhodes was willing to testify for him (PCR L.F. 27-28; Sent. Tr. 10-11. 13-16). Appellant told the court at sentencing that he had spoken with Rhodes' and Rhodes was willing to testify that Appellant had nothing to do with the shooting of Shelby (Sent. Tr. 13-15). Defense counsel told Appellant he did not believe Appellant had told him Rhodes was willing to testify, but allowed that he might be wrong, stating, "I'll check my file again" (Sent. Tr. 14-15).

Included in a defendant's right to the effective assistance of counsel is the right to a thorough investigation of his case by his attorney. *Thomas v. State*, 516 S.W.2d 761, 764 (Mo. App. 1974); *Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982). The duty of defense counsel includes contacting potential witnesses named by the defendant who might aid the defense. *Thomas*, 516 S.W.2d at 765; *Owens v. State*, 596 S.W.2d 480, 482 (Mo. App. 1981) [Defense counsel's failure to interview and call witnesses

who would have established a defense, if proved, entitles movant to relief].

"The decision to interview a witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial." *Henderson v. Sergeant*, 926 F.2d 706, 711 (8th Cir. 1991), *citing*, *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990). Whether defense counsel's efforts are reasonable depends on the facts in each case. *Porter v. State*, 596 S.W.2d 706 (Mo. App. 1982). To establish counsel was ineffective for failing to call a witness, a movant must prove that the witness could have been located thorough reasonable investigation, would have testified if called, and would have provided the movant with a viable defense. *State v. Vinson*, 800 S.W.2d 444, 448 (Mo. banc 1990).

In *Perkins-Bey v. State*, 735 S.W.2d 170, 172 (Mo. App. 1987), the movant's convictions were reversed and a new trial was ordered because defense counsel did not take all reasonable steps to investigate and present favorable evidence. Defense counsel was found ineffective for failing to thoroughly investigate and subpoena an alibi witness, even though it was established that the witness was contacted by defense counsel and defense counsel's investigator. *Id.* The appellate court concluded the movant had established he was prejudiced by defense counsel's inaction. *Id.* "The presence of the alibi witness may not have changed the result, but the probability cannot be ignored and meets the minimum standard of undermining confidence in the outcome." *Id.*

In this case, defense counsel did not investigate the possibility that Reginald Rhodes might be willing to testify on Appellant's behalf. Rhodes had already pleaded guilty to the shooting death of Steve Shelby, and hence had little, if anything, to lose by testifying that Appellant was not involved in the shooting (Sent. Tr. 14-16). Defense counsel claimed at sentencing that he did not remember Appellant

mentioning Rhodes as a possible witness, but that he surely would have told Appellant the jury would not believe Rhodes even if he were willing to testify (Sent. Tr. 13-17). The motion court found this "decision" to be a matter of trial strategy (PCR L.F. 38). Appellant notes, however, that counsel made his assumption without even investigating the possibility that Rhodes would be willing to testify, and without even talking to Rhodes to make an informed decision about Rhodes's credibility if he were to testify (Tr. 13-17). The motion court's findings are clearly in error, as one logically cannot make a trial strategy decision in the absence of appropriate investigation. As in *Perkins-Bey*, the probability that Rhodes's testimony might have changed the result of the trial cannot be ignored and meets the minimum standard of undermining confidence in the outcome of Appellant's trial.

Appellant is also entitled to an evidentiary hearing on his claims relating to the trial court overruling his motion for continuance after Appellant's alibi witnesses mysteriously disappeared from the courthouse (PCR L.F. 21-25). Defense counsel made a lengthy record at time of trial regarding what had happened, based on the scant information then available (Tr. 572-584). At that time, all that was known was that the witnesses, who were under subpoena, had been present at the courthouse on the morning of February 24, 1994, and that they left the courthouse sometime after 11:00 a.m. (Tr. 573-580). As more fully developed in Point I, Appellant was forced to rest his case without presenting his evidence of alibi, after the trial court overruled defense counsel's motion for continuance (Tr. 582-584, 590).

Appellant has alleged that the mysterious disappearance of his witnesses and the trial court's ruling on the continuance motion have violated his right to the effective assistance of counsel (PCR L.F. 21-25). Appellant has alleged that since his trial he has learned that an unknown person, believed to

have been employed by the Jackson County Prosecutor's Office, told Appellant's alibi witnesses that they could leave the courthouse because their testimony was not needed (Tr. 21-25). Appellant has alleged that Laura Lee and Gladys and James Edwards left the courthouse and went to the home of a relative to await news of the verdict, not knowing that Appellant still needed them present to testify (PCR L.F. 21-25).

In denying a hearing on this claim, the motion court held that Appellant has failed to show that counsel was in any way responsible for the witnesses's failure to appear and testify (PCR L.F. 34). This finding is clearly erroneous and fails to appreciate the full extent of Appellant's claim. Although defense counsel did investigate Laura Lee and Gladys and James Edwards and made efforts to obtain their alibi testimony for Appellant, defense counsel's efforts were thwarted when Appellant's witnesses disappeared and when the trial court refused to allow counsel even a minimal amount of time to attempt to locate them. Regardless of counsel's earlier efforts, counsel cannot be deemed effective in his representation when people or forces outside the attorney-client relationship interfere with counsel's presentation of evidence in his client's behalf. The probability cannot be ignored in this case that the presence of the alibi witnesses may have changed the result of Appellant's trial. Appellant has at the very least met the minimum standard of undermining confidence in the outcome of his trial, and should have been granted an evidentiary hearing on this issue.

Appellant has been denied his constitutional rights to the effective assistance of counsel and to due process of law, and has been prejudiced thereby. Appellant therefore respectfully requests that this Court reverse the judgment of the hearing court and remand this cause for an evidentiary hearing.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. 49456

STATE OF MISSOURI,

Respondent,

vs.

REMON M. LEE,

Appellant.

Appeal from the Circuit Court of
Jackson County, Missouri
Sixteenth Judicial Circuit
The Honorable Anthony P. Nugent, Trial Judge
The Honorable Thomas C. Clark, PCR Judge

RESPONDENT'S STATEMENT,
BRIEF AND ARGUMENT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for the felonies of murder in the first degree, § 565.020, RSMo 1994, and armed criminal action, § 571.015, RSMo 1994, obtained in the Circuit Court of Jackson County, Missouri, for which appellant was sentenced to life imprisonment without parole in the Missouri Department of Corrections for the count of murder in the first degree and ten years imprisonment in the Missouri Department of Corrections on the count of armed criminal action. This appeal is also from the denial of appellant's Rule 29.15 motion. The appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Remon Lee, was charged by indictment filed on March 12, 1993 (L.F. 1-2), and later by information in lieu of indictment (L.F. 5-6), as a prior and persistent offender, §558.016, 557.036, and 558.019, RSMo 1994, with murder in the first degree, §565.020, RSMo 1994, and armed criminal action, §571.015, RSMo 1994.[1] On February 22, 1994, the cause proceeded to trial before the Honorable Anthony P. Nugent (Tr. 11).

Appellant does not challenge the sufficiency of the evidence adduced at trial which viewed in the light most favorable to the verdict is as follows: On the afternoon of August 27, 1992, Reginald Williams and William Sanders were at a vacant lot on Monroe between 67th and 68th Streets in Jackson County trying to start Williams' Moped (Tr. 205-206, 260, 384-385). While trying to start the Moped, a rusty

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[1] All statutory citations are to RSMo 1994, unless otherwise noted.

red or orange and white older model Chevrolet pickup truck drove past them (Tr. 207, 209, 386). Both Williams and Sanders identified appellant in court as the driver of the pickup truck (Tr. 208, 414). Appellant was the only person in the truck (Tr. 211, 388).

Appellant drove by Williams and Sanders southbound on Monroe without "really paying no attention . . . first" (Tr. 208-209). Appellant then turned his truck around in a driveway across the street from Williams and Sanders (Tr. 210, 386). As appellant proceeded back north on Monroe, he drove "real slow" past Williams and Sanders and stared at them for approximately ten seconds (Tr. 212, 386, 399). Appellant then stopped the truck on Monroe a short distance away from Williams and Sanders (Tr. 388, 402).

Upon observing the truck, Sanders told Williams "put the bike up, because, you know, something's about to go down. . . . man, he's up here too long, dude, put the bike up" (Tr. 389). Sanders later testified at trial that he knew "something was about to go down by the way [appellant] stared at us" (Tr. 389). However, Williams and Sanders remained at the vacant lot.

Approximately thirty minutes after appellant had stopped on Monroe, a blue Chevy Nova came around the corner with a driver and one passenger and stopped on Monroe directly across from appellant's truck (Tr. 215, 390). The passenger, Reginald Rhodes, exited the passenger side of the car, came around to the driver's side, and shot the driver, Steve Shelby, several times in the shoulder, head and neck (Tr. 214-215, 390, 394, 402, 410-411). The shooter Rhodes then entered appellant's waiting truck, and appellant "burnt rubber" away from the scene (Tr. 220, 390, 401). The driver of the Nova, Steve Shelby, died from nine close range gunshot wounds to his left shoulder, head, and neck (Tr. 436-439).

Later that day, Williams identified appellant as the driver of the truck from a photo lineup (Tr. 226-227, 355-356). Williams also identified appellant as the driver from two videotape lineups (Tr. 230, 365, 369-372). Sanders gave the police a description of the driver which matched appellant (Tr. 393, 412). Sanders also identified a photo of appellant from a lineup but told police that he could not say for sure that appellant was the driver without seeing a better picture (Tr. 411).

Rhonda Shelby, the victim's sister, and her neighbor Lynne Bryant, both testified at trial that on August 26, 1992, the night before the murder, appellant and Reginald Rhodes were in an orange or red pickup truck looking for the victim, Steve Shelby (Tr. 443-445, 452-453, 455-456, 471-473, 478).

The jury found appellant guilty (L.F. 34, 36). On April 19, 1994, Judge Nugent sentenced appellant to life in the Missouri Department of Corrections without the benefit of parole or possibility of probation for the count of murder in the first degree plus ten years for the armed criminal action count (Sent. Tr. 8).

On April 29, 1994, appellant filed a notice of appeal (L.F. 54). Appellant apparently submitted a *pro se* motion to vacate, set aside or correct the judgment or sentence on November 21, 1994 (PCR L.F. 1-14). On July 3, 1995, appellant filed a first amended application for post-conviction relief pursuant to Rule 29.15 (PCR L.F. 20-30). On August 21, 1995, Judge Thomas Clark, issued findings of fact and conclusions of law denying appellant's Rule 29.15 motion without an evidentiary hearing (PCR L.F. 32-46). Appellant filed a notice of appeal on October 2, 1995 (PCR L.F. 48). This appeal follows.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S REQUEST FOR A CONTINUANCE DUE TO ALLEGED MISSING WITNESSES, FILED AFTER THE STATE'S CASE IN CHIEF, BECAUSE APPELLANT FAILED TO MEET THE REQUIREMENTS OF SUPREME COURT RULE 24.10 TO THE SATISFACTION OF THE TRIAL COURT IN THAT APPELLANT FAILED TO SHOW THE MATERIALITY OF THE WITNESSES' TESTIMONY, TO SET FORTH THE PARTICULAR FACTS THE WITNESSES WERE SUPPOSED TO PROVE, TO SHOW THAT THE ATTENDANCE OF THE WITNESSES WOULD BE PROCURED WITHIN A REASONABLE TIME, AND THAT THE WITNESSES' ABSENCE WAS NOT DUE TO HIS OWN PROCUREMENT. FURTHERMORE, THE TRIAL COURT'S DECISION SHOULD NOT BE REVERSED ON APPEAL BECAUSE APPELLANT HAS FAILED TO SHOW A REASONABLE PROBABILITY THAT THE WITNESSES' TESTIMONY WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL IN THAT THE STATE'S EVIDENCE OF HIS GUILT WAS OVERWHELMING.

State v. Schaal, 806 S.W.2d 659 (Mo. banc 1991), *cert. denied*, 112 S.Ct. 976 (1992);
State v. Gregory, 832 S.W.2d 526 (Mo.App., S.D. 1992);
State v. Brookins, 468 S.W.2d 42 (Mo. 1971);
State v. Menteer, 845 S.W.2d 581 (Mo.App., E.D. 1992);
State v. Winston, 627 S.W.2d 915 (Mo.App., W.D. 1982);
State v. Gaskin, 618 S.W.2d 620 (Mo. 1981);
State v. Fuller, 837 S.W.2d 304 (Mo.App. W.D. 1992);

State v. Reece, 505 S.W.2d 50 (Mo. 1974);
State v. Davis, 625 S.W.2d 903 (Mo.App. W.D. 1981);
Supreme Court Rule 24.10.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S RULE 29.15 MOTION ALLEGING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL APPELLANT'S CODEFENDANT TO TESTIFY BECAUSE 1) THE RECORD REFUTES APPELLANT'S CLAIM IN THAT AT THE TIME OF TRIAL HE NO LONGER WANTED THE WITNESS CALLED, 2) THE DECISION TO CALL THE WITNESS WAS A MATTER OF TRIAL STRATEGY, AND 3) APPELLANT FAILED TO ALLEGE THAT THE WITNESS WAS AVAILABLE AND WILLING TO TESTIFY. FURTHERMORE, THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.15 CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE ON THE GROUND THAT "THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S MOTION FOR CONTINUANCE," BECAUSE 1) APPELLANT DOES NOT ALLEGE THAT HIS TRIAL COUNSEL ACTED UNREASONABLY, 2) APPELLANT'S CLAIM IS AN IMPERMISSIBLE ATTEMPT TO ARGUE THE SAME CLAIM HE RAISED ON DIRECT APPEAL, AND 3) APPELLANT FAILED TO PLEAD FACTS TO SUPPORT HIS CLAIM.

Day v. State, 770 S.W.2d 692 (Mo. banc), *cert. denied sub nom. Walker v. Missouri*, 493 U.S. 866 (1989);
Antwine v. State, 791 S.W.2d 403 (Mo. banc 1990), *cert denied*, 498 U.S. 1055 (1991);
Lestourgeon v. State, 837 S.W.2d 588 (Mo.App., W.D. 1992);

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984);
State v. Preston, 861 S.W.2d 627 (Mo.App., E.D. 1993);
Eberspacher v. State, 915 S.W.2d 384 (Mo.App. W.D. 1996);
Eldridge v. State, 592 S.W.2d 738 (Mo. banc 1979);
State v. White, 870 S.W.2d 869 (Mo.App. W.D. 1993);
State v. Dudley, 819 S.W.2d 51 (Mo. App. S.D. 1991);
State v. Twenter, 818 S.W.2d 628 (Mo. banc 1991);
State v. Kirk, 918 S.W.2d 307 (Mo.App. S.D. 1996);
Supreme Court Rule 29.15.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S REQUEST FOR A CONTINUANCE DUE TO ALLEGED MISSING WITNESSES, FILED AFTER THE STATE'S CASE IN CHIEF, BECAUSE APPELLANT FAILED TO MEET THE REQUIREMENTS OF SUPREME COURT RULE 24.10 TO THE SATISFACTION OF THE TRIAL COURT IN THAT APPELLANT FAILED TO SHOW THE MATERIALITY OF THE WITNESSES' TESTIMONY, TO SET FORTH THE PARTICULAR FACTS THE WITNESSES WERE SUPPOSED TO PROVE, TO SHOW THAT THE ATTENDANCE OF THE WITNESSES WOULD BE PROCURED WITHIN A REASONABLE TIME, AND THAT THE WITNESSES' ABSENCE WAS NOT DUE TO HIS OWN PROCUREMENT. FURTHERMORE, THE TRIAL COURT'S DECISION SHOULD NOT BE REVERSED ON APPEAL BECAUSE APPELLANT HAS FAILED TO SHOW A REASONABLE PROBABILITY THAT THE WITNESSES' TESTIMONY WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL IN THAT THE STATE'S EVIDENCE OF HIS GUILT WAS OVERWHELMING.

Appellant alleges that the trial court abused its discretion when it overruled appellant's motion for a continuance because his stepfather James Edwards, his mother Gladys Edwards, and his sister Laura Lee "mysteriously disappeared from the Courthouse before testifying" (App. Br. 11). Even though appellant did not allege what the three would testify to while making the motion, appellant alleges in his brief that the three were "alibi witnesses" (App. Br 11). Appellant also alleges that "the trial court's reasons for denying the continuance had nothing to do with the case itself, but rather with the Court's personal schedule (App. Br. 11).

Appellant's case in chief began on the morning of the third day of trial (Tr. 491). Appellant's counsel had apparently subpoenaed all three witnesses to show up at 9:00 am (Tr. 580-582). While appellant never actually attempted to call any of the three to the stand, when Court resumed at 1:00 pm after the noon recess (Tr. 572), he alleged that all three had left at 11:00 am (Tr. 576). Neither appellant or his counsel knew where they were or how to get in touch with them (Tr. 576). Also, appellant's girlfriend tried to find them but could not (Tr. 576).

Appellant stated that he would like a "couple hours' continuance" to try and locate them (Tr. 577). Appellant's counsel then asked for a continuance until 9:30 am, Friday, the following day (Tr. 580). The following dialog then took place:

> THE COURT: Well, I'm going to have to deny the motion for continuance. It looks to me as though the folks were here and then in effect abandoned the defendant. And that, of course, we can't—we can't blame on the State. The State had absolutely nothing to do with that. That's—it's too bad. The Court will not be able to be here tomorrow to try the case.
>
> APPELLANT'S COUNSEL: How about Monday, Judge? The jury's not locked up. Could we set it over until Monday morning?
>
> THE COURT: I've got another case set for trial that will take a week starting Monday morning. I'm not in a position to grant a continuance under these circumstances. The folks were here today. They were seen here on this floor of the Courthouse, and they apparently simply have abandoned—
>
> APPELLANT'S COUNSEL: Well—
>
> THE COURT: —the defendant in—although they're family, despite the fact that they're under subpoena.

> APPELLANT'S COUNSEL: It looks like that, Judge. I Don't know. I would—I can neither confirm nor deny. It may be that someone threatened them, but I have no proof of that. They may, as the Court said, have been abandoned. I don't know.
>
> THE COURT: I have to deny the motion for continuance.
>
> APPELLANT'S COUNSEL: All right, Sir.
>
> THE COURT: We have to go ahead with the trial.

(Tr. 582-584).

The decision to grant or deny a continuance rests within the sound discretion of the trial court, and a very strong showing is required to prove an abuse of that discretion. *State v. Schaal*, 806 S.W.2d 659, 666 (Mo. banc 1991), *cert. denied*, 112 S.Ct. 976 (1992); *State v. Gregory*, 832 S.W.2d 526, 528 (Mo.App., S.D. 1992); *State v. Brookins*, 468 S.W.2d 42, 45 (Mo. 1971). Generally, "[b]efore a refusal to grant a continuance will constitute an abuse of discretion, a defendant must demonstrate that the denial of the continuance prejudiced his defense." *State v. Edwards*, 657 S.W.2d 343, 345 (Mo.App., S.D. 1983). The party requesting the continuance bears the burden of showing the requisite prejudice. *State v. Menteer*, 845 S.W.2d 581, 584 (Mo.App., E.D. 1992). When an appellate court is called upon to review the discretion exercised by a trial court in refusing to grant a continuance, "every intendment of the trial court's action is indulged." *State v. Winston*, 627 S.W.2d 915, 917 (Mo.App., W.D. 1982) citing *State v. Gaskin*, 618 S.W.2d 620, 626 (Mo. 1981)

Supreme Court Rule 24.10 specifically addresses applications for continuances on account of the absence of witnesses. Rule 24.10 requires that an application for continuance because of missing witnesses show:

(a) The facts showing the materiality of the evidence sought to be obtained and due diligence upon the part of the applicant to obtain such witness or testimony;

(b) [F]acts showing reasonable grounds for belief that the attendance or testimony of such witness will be procured within a reasonable time;

(c) What particular facts the affiant believes the witness will provide, and that he knows of no other person whose evidence or attendance he could have procured at trial, by whom he can prove or so fully prove the same facts;

(d) That such witness is not absent by the connivance, consent, or procurement of the applicant, and such application is not made for vexation or delay. . . ;

At trial when appellant requested the continuance, appellant made no showing of the materiality of the testimony of James Edwards, Gladys Edwards, or Laura Lee. Supreme Court Rule 24.10(a). Neither did appellant set forth the particular facts he believed the three would prove. Supreme Court Rule 24.10(c).

Appellant did not set forth any facts showing reasonable grounds for belief that the attendance or testimony of the witnesses would be produced within a reasonable time. Supreme Court Rule 24.10(b). The Missouri Supreme Court has specifically held that "[t]his is not a hollow admonition, and one seeking a continuance on account of the absence of a witness must produce facts which satisfy a court that the attendance or testimony or an absent witness can be procured within a reasonable time." *State v. Winston,* supra at 918. Furthermore, appellant did not testify that the witnesses absence was not due to his own procurement. Supreme Court Rule 24.10(d).

Even if appellant had met all the requirements of Rule 24.10, the decision to grant the continuance would still be at

discretion of the Court "if the court shall be of the opinion that the affidavit is sufficient." Supreme Court Rule 24.10. The fact that appellant's request for a continuance was not sufficient establishes that the court's denial of the motion was not an abuse of discretion.

Appellant alleges that Judge Nugent overruled his continuance solely because the Judge's daughter was going to be in the hospital the next day (App. Br 16). However, Judge Nugent simply stated to the attorneys that court would not be in session the following day because he had to be at the hospital with his daughter (Tr. 580). For whatever reason court was not in session the following day, whether Judge Nugent's daughter was being admitted to the hospital or whether Judge Nugent himself was being admitted, is irrelevant to the merits of appellant's request for a continuance. The fact that appellant's continuance request did not satisfy the safeguards of Rule 24.10 makes his argument that his motion was denied solely for the Judge's personal reasons incredible.

Furthermore, in order to warrant reversal on appeal, the appellant must show that it is reasonably probable that the witness's testimony would change the outcome of the trial. *State v. Fuller*, 837 5.W.2d 304, 307 (Mo.App. W.D. 1992); *State v. Reece*, 505 S.W.2d 50, 52 (Mo. 1974); *State v. Davis*, 625 S.W.2d 903, 905 (Mo.App. W.D. 1981). Appellant alleges in his motion for new trial and his brief that his stepfather James Edwards, his mother Gladys Edwards, and his sister Laura Lee would have provided alibi testimony that appellant was not in Missouri, but rather in the State of California on August 27, 1992, at the time of the murder. (L.F. 52; App. Br 14). Appellant further alleges in his amended Rule 29.15 motion that the three witnesses would have testified that he was in California "for the entire month of August, 1992" (PCR L.F. 21).

Even if the witnesses did provide such testimony, which there is absolutely no evidence that they would have testified to such facts, appellant has not established that the outcome of his trial would have been any different had they testified. Eyewitnesses to the murder identified appellant as the driver of the get-away truck both immediately after the incident and in court. (Tr. 208, 226-227, 230,265, 355-356, 369-372, 411, 414). Also, the victims sister and her neighbor both testified that the night before the murder appellant came to their apartment complex looking for the victim (Tr. 443-445, 452-453, 455-456, 471-473, 478). Because the State produced overwhelming evidence that appellant was in Jackson County both the day of the murder and the previous night, it is highly improbable that the jury would have found that he was in California for "the entire month of August."

Because appellant failed to prove an abuse of discretion by a "very strong showing," and failed to prove that the outcome of his trial would have been different had his stepfather, mother and sister testified, his first point should be denied.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S RULE 29.15 MOTION ALLEGING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL APPELLANT'S CODEFENDANT TO TESTIFY BECAUSE 1) THE RECORD REFUTES APPELLANT'S CLAIM IN THAT AT THE TIME OF TRIAL HE NO LONGER WANTED THE WITNESS CALLED, 2) THE DECISION TO CALL THE WITNESS WAS A MATTER OF TRIAL STRATEGY, AND 3) APPELLANT FAILED TO ALLEGE THAT THE WITNESS WAS AVAILABLE AND WILLING TO TESTIFY. FURTHERMORE , THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S

RULE 29.15 CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE ON THE GROUND THAT "THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S MOTION FORCONTINUANCE," BECAUSE 1) APPELLANT DOES NOT ALLEGE THAT HIS TRIAL COUNSEL ACTED UNREASONABLY, 2) APPELLANT'S CLAIM IS AN IMPERMISSIBLE ATTEMPT TO ARGUE THE SAME CLAIM HE RAISED ON DIRECT APPEAL, AND 3) APPELLANT FAILED TO PLEAD FACTS TO SUPPORT HIS CLAIM.

Appellant claims that the motion court erred in denying his claim of ineffective assistance of counsel for his trial counsel's failure to call "appellant's codefendant Reginald Rhodes to testify on appellant's behalf that appellant was not involved in the shooting death of Steve Shelby" (App. Br 18). Specifically, appellant alleges that his "defense counsel did not investigate the *possibility* that Reginald Rhodes *might be willing* to testify on appellant's behalf" (App. Br. 22) (emphasis added). Appellant also alleges that he is entitled to post-conviction relief because "the trial court overruled defense counsel's motion for continuance after appellant's alibi witnesses mysteriously disappeared from the courthouse" (App. Br 18). Appellant does not allege that his trial counsel was in any way ineffective in seeking the continuance or that his counsel was in any way responsible for the witnesses leaving the courthouse (App. Br. 24).

Appellate court review of the denial of post-conviction relief is limited to a determination of whether the findings, conclusions, and judgment of the motion court are clearly erroneous. *Day v. State*, 770 S.W.2d 692, 695-696 (Mo. banc), *cert. denied sub nom, Walker v. Missouri*, 493 U.S. 866 (1989). Such findings and conclusions are presumed correct and only deemed clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm impression that a mistake has been made. *Antwine v.*

State, 791 S.W.2d 403, 406 (Mo. banc 1990), *cert denied*, 498 U.S. 1055 (1991). The party contesting the motion court's findings has the burden of showing them to be clearly erroneous. *Lestourgeon v. State*, 837 S.W.2d 588, 590 (Mo.App., W.D. 1992).

Appellant's claim of ineffective assistance of counsel is subject to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). To prevail, appellant must demonstrate 1) that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances, and 2) that he was prejudiced by such a failure. *Id.*, 466 U.S. at 687.

To be entitled to an evidentiary hearing on the issue of ineffective assistance of counsel, a movant seeking relief under Rule 29.15 must plead facts, not conclusions, which if true, would warrant relief. *State v. Preston*, 861 S.W.2d 627, 632 (Mo.App., E.D. 1993). The allegations must not be refuted by the record, and the matters complained of must have prejudiced the movant. *Id.* A hearing is not required if the motion, files and records of the case conclusively show that the movant is not entitled to relief. *Id.*

Appellant first alleges that his trial counsel was ineffective in not calling "appellant's codefendant Reginald Rhodes to testify on appellant's behalf that appellant was not involved in the shooting death of Steve Shelby" (App. Br 18). Specifically, appellant alleges that his "defense counsel did not investigate the *possibility* that Reginald Rhodes *might be willing* to testify on appellant's behalf" (App. Br. 22) (emphasis added).

At appellant's sentencing, appellant testified that he wanted his trial counsel to call his co-defendant, Reginald Rhodes, who had previously pled guilty to being the shooter, to testify that appellant "had no involvement in this crime, that [appellant] wasn't present, that [appellant] had no knowledge

of it" (Sent Tr. 10, 13-14). Appellant's trial counsel responded to this saying:

> Well, I have no recollection at all. I'll check my file again, but I have no recollection at all of you ever telling me about that, or I would certainly have had him there if I could.
>
> * * *
>
> In my opinion, I doubt very much if a jury would believe you. It's been my experience in 40 years of trying criminal cases that they wouldn't believe him anyway to exonerate you completely in view of the State's testimony.

(Sent Tr. 14). The following dialog then transpired between appellant and his trial counsel while appellant was under oath:

> COUNSEL: Sir, I take it your recollection is that you told me about that before trial?
>
> APPELLANT: Before trial. Yes.
>
> COUNSEL: Why didn't you tell me about it during the trial so we could at least sent (sic) the subpoena or writ out?
>
> APPELLANT: Well, my understanding—I had told you about all the witnesses I want, and you told me you have subpoenaed everyone. And then—
>
> COUNSEL: But I told you in advance who our witnesses were going to be. Don't you remember? Your mother, your father and your sister?
>
> APPELLANT: Right.
>
> COUNSEL: And you made no mention of this other witness you're talking about. Why didn't you say, "Well, you didn't get that guy for me."?

APPELLANT: You had told me in the visiting room over at the county jail that wouldn't no jury believe him anyway.

COUNSEL: I'm sure I did. Just like I told you now.

(Sent. Tr. 15-16).

As the above dialog demonstrates, appellant's claim is directly refuted by the record in that at the time of trial appellant no longer wished to call Reginald Rhodes to the stand. Appellant's trial counsel could not be ineffective in failing to call a witness that appellant no longer wished to call. *Eberspacher v. State*, 915 S.W.2d 384, 387 (Mo.App. W.D. 1996).

Furthermore, the motion court was not clearly erroneous in finding that the decision to not call Reginald Rhodes was a matter of trial strategy (PCR L.F. 37-38). "If an attorney believes that the testimony of an alibi witness would not unqualifiedly support his client's position, it is a matter of trial strategy not to call him to the stand." *Eldridge v. State*, 592 S.W.2d 738, 741 (Mo. banc 1979). The selection of witnesses remains a question of trial strategy that is "virtually unchallengeable" in a post-conviction proceeding. *State v. White*, 870 S.W.2d 869, 875 (Mo.App. W.D. 1993).

The motion court further found that appellant failed to allege "whether counsel was informed or had any knowledge of Reginald Rhodes willingness to testify on movant's behalf" (PCR L.F. 38). See *State v. Dudley*, 819 S.W.2d 51, 56 (Mo. App. S.D. 1991).

Appellant also alleges that his trial counsel was ineffective because "the trial court overruled defense counsel's motion for continuance after appellant's alibi witnesses mysteriously disappeared from the courthouse" (App. Br 18). Appellant does not allege that his trial counsel was in any way ineffective in seeking the continuance or that his counsel was in any way responsible for the witnesses leaving the

courthouse (App. Br. 24). Accordingly, the motion court was not erroneous in finding that appellant failed to carry his burden of showing that his trial counsel was in any way at fault for the disappearance of the witnesses (PCR L.F. 34). See *State v. Twenter*, 818 S.W.2d 628, 637 (Mo. banc 1991). Absent a showing that appellant's trial counsel acted unreasonably, appellant fails to satisfy the first prong of *Strickland. Strickland v. Washington, supra* at 687.

Furthermore, appellant's claim is an impermissible attempt to raise the same claim he raised on direct appeal in Point I.[2] *State v. Kirk*, 918 S.W.2d 307, 310 (Mo.App. S.D. 1996). While appellant does add the additional assertion to his PCR claim that "since his trial [appellant] has learned that an unknown person, believed to have been employed by the Jackson County Prosecutor's Office, told appellant's alibi witnesses that they could leave the courthouse because their testimony was not needed" (App. Br 23), the assertion is a self-serving conclusion unsupported by any evidence. Appellant does not allege in his 29.15 motion who this mystery person is, how it is "believed" that such person was from the Jackson County Prosecutor's Office, or what evidence or witnesses would testify to such allegations at an evidentiary hearing (PCR L.F. 23-25). See *State v. Preston*, *supra*.

For all the forgoing reason's, appellant's second point on appeal fails.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's conviction and sentence and the denial of his Rule 29.15 motion should be affirmed.

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[2]The merits of appellant's claim are addressed in Point I, *supra*.

Respectfully submitted,

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 49456
Consolidated with WD 51717

ORDER FILED:
OCTOBER 22, 1996

STATE OF MISSOURI,
Respondent,
v.
REMON M. LEE,
Appellant.

REMON M. LEE,
Appellant,
v.
STATE OF MISSOURI,
Respondent.

Appeal From the Circuit Court of Jackson County,
Missouri Honorable Anthony P. Nugent, Jr., Judge

Before: Spinden, P.J., Smart and Smith, JJ

ORDER

PER CURIAM

Appeal from judgment of conviction for murder in the first degree, § 565.020 RSMo 1994, and armed criminal action, § 571.015 RSMo 1994, and order denying Rule 29.15 motion without an evidentiary hearing.

Judgment of conviction and order denying Rule 29.15 motion affirmed. Rule 30.25(b); and Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 49456
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FILED:
OCTOBER 22, 1996

STATE OF MISSOURI,
Respondent,

v.

REMON M. LEE,
Appellant.

REMON M. LEE,
Appellant,

v.

STATE OF MISSOURI,
Respondent.

MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING JUDGMENT PURSUANT TO
RULE 84.16(b) and 30.25(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE TH1S COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

This is a consolidated appeal pursuant to Rule 29.15(l). Remon Lee (hereinafter appellant) was convicted of the felonies of murder in the first degree, § 565.020[1], and armed criminal action, § 571.015. The appellant was sentenced to concurrent terms of life imprisonment without parole for murder in the first degree and ten years imprisonment for armed criminal action.

On direct appeal, appellant alleges that the trial court erred in overruling appellant's motion for continuance after his alibi witnesses disappeared from the courthouse before they were to testify. In appealing the denial of his Rule 29.15 motion without an evidentiary hearing, appellant alleges: 1) his trial counsel was ineffective in that he failed to call a particular witness to testify at trial; and 2) because appellant's motion for continuance to locate his alibi witnesses was overruled, his trial counsel was unable to adequately represent him.

We affirm.

FACTS

Appellant, Remon Lee, was charged with one count of murder in the first degree and one count of armed criminal action for the shooting death of Steve Shelby. On August 27, 1992, Reginald Williams and Williams Sanders first saw Lee drive a rusty orange or red truck southbound on Monroe Street in Jackson County, then saw Lee park the truck. After about thirty minutes, Williams and Sanders saw a blue Chevy Nova stop on Monroe Street, directly across from the truck where Lee was waiting. The passenger of the Nova, Reginald Rhodes, exited the car and walked around to the driver's side. Rhodes then began firing shots into the driver's side of the Nova where Shelby was sitting. After hitting Shelby several times in the shoulder, head and neck, Rhodes ran behind

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[1] All statutory references are to RSMo 1994, unless otherwise indicated.

Lee's truck and got into the passenger side. Leaving tire tracks in the street, Lee and Rhodes quickly drove away from the scene. Shelby later died of gunshot wounds that caused penetrating injuries to the brain. The seven bullets that were recovered were all fired from the same gun.

The two men who witnessed the events that took place, Williams and Sanders, were questioned and shown police lineups. Williams identified appellant as the driver after viewing photographic and video lineups. Sanders picked Rhodes as the shooter out of a photographic lineup and at trial identified appellant as the driver of the truck. Other testimony also placed appellant and Rhodes at the scene of the shooting.

For appellant's defense, he was planning to have three subpoenaed family members from California voluntarily testify that he was with them during the month the murder took place. Although these witnesses were at the courthouse during the morning session, they could not be located after the lunch recess. Because he believed his family to still be in town for a religious activity that evening, appellant asked his attorney to move for a continuance so that his witnesses could testify the next morning. The court overruled the motion, as the judge determined appellant's family had "abandoned" him. The judge also stated that he could not continue the trial because his daughter was to be in surgery and he was going to stay with her all day.

The court overruled appellant's motion for judgment of acquittal at the close of the state's evidence and at the close of all of the evidence. Appellant filed a notice of appeal on April 29, 1994, a *pro se* motion to vacate, set aside or correct the judgment or sentence on November 21, 1994, and an amended application for postconviction relief on July 3, 1995. Without an evidentiary hearing, the motion court denied appellant's Rule 29.15 motion. Appellant now appeals his conviction and the denial of his Rule 29.1 5 motion without an evidentiary hearing.

I. DIRECT APPEAL

STANDARD OF REVIEW

As held by the Missouri Supreme Court in *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 207 (Mo. banc 1991), our standard of review is as follows:

> As a general principal, the grant or denial of a continuance is largely within the discretion of the trial court. In reviewing a trial court's denial of a continuance based on absence of witnesses, every intendment is made favoring the correctness of that ruling. The denial of a continuance is rarely reversible error, but the trial court does not enjoy absolute or arbitrary discretion. (citations omitted).

Id. The trial court may take into account the probability that a missing witness may or may not be found, and a refusal to grant a motion for continuance will only be reversed if it is ". . . reasonably probable that the witness' testimony will result in a different outcome." *State v. Fuller*, 837 S.W.2d 304, 307 (Mo. App. 1992).

DISCUSSION

Appellant asserts that the trial court erred by failing to grant his motion for continuance. Missouri Supreme Court Rule 24.09 concerns the process by which applicants can secure a motion for continuance in a misdemeanor or felony trial:

> An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally

Rule 24.09; *State v. Morin*, 873 S.W.2d 858, 871 (Mo. App. 1994). After a careful review of the transcript and legal file,

we find that appellant's motion was oral, although we find no indication of the State's consent to this deviation, as is required by Rule 24.09. Thus, the trial court could have properly denied the motion for a failure to comply with Rule 24.09.

Even assuming, *arguendo,* that the oral motion was sufficient, appellant's argument still fails. Whether the motion is written or oral, Rule 24.10 sets out the required elements for a continuance to be granted on the basis of an absent witness:

> (a) The facts showing the materiality of the evidence sought to be obtained and due diligence upon the part of the applicant to obtain such witness or testimony;
>
> (b) The name and residence of such witness, if known, or, if not known, the use of diligence to obtain the same, and also facts showing reasonable grounds for belief that the attendance or testimony of such witness will be procured within a reasonable time;
>
> (c) What particular facts the affiant believes the witness will prove, and that he knows of no other person whose evidence or attendance he could have procured at the trial, by whom he can prove or so fully prove the same facts;
>
> (d) That such witness is not absent by the connivance, consent, or procurement of the applicant, and such application is not made for vexation or delay, but in good faith for the purpose of obtaining a fair and impartial trial.

Rule 24.10. After a careful review of the record, we find appellant's motion was made without the factual showing required by Rule 24.10. When a denial to grant a motion for continuance is based on a deficient application, it does not constitute an abuse of discretion. *Morin,* 873 S.W.2d at 871. As appellant has the burden of establishing that the trial court

abused its discretion in denying his motion for continuance, we find that the trial court did not abuse its discretion here. *Fuller,* 837 S.W.2d at 307.

Even if appellant had established an abuse of discretion by the trial court in denying his motion, he cannot show prejudice thereby, which is necessary to prevail on this point. *Id.* In order to show prejudice, appellant has the burden of showing that the testimony of the absent witnesses was so crucial that it is reasonably probable a different outcome would have resulted. *Id.*

Point denied.

II. POSTCONVICTION RELIEF MOTION

STANDARD OF REVIEW

Appellate review of the motion court's denial of a postconviction relief motion is not a de novo review; rather, the findings of fact and conclusions of law of the motion court are presumptively correct. *Wilson v.* State, 813 S.W.2d 833, 835 (Mo. banc 1991). Review of a motion court's actions is limited to a determination of whether the trial court's findings and conclusions are clearly erroneous. Rule 29.15; *State v. Driver,* 912 S.W.2d 52, 54 (Mo. banc 1995). Findings and conclusions are deemed clearly erroneous only if, after reviewing the entire record, we are left with the definite and firm impression that a mistake has been made. *Wilson,* 813 S.W.2d at 835.

DISCUSSION

To prove ineffective assistance of counsel, the movant must show that: 1) trial counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display rendering similar services under the existing circumstances; and that 2) he or she was prejudiced by such conduct or lack thereof. *Strickland v. Washington,*

466 U.S. 668, 687 (1984). The movant must show a reasonable probability that, but for his attorney's unprofessional errors, the result of the proceeding would have been different. *State v. Harris*, 870 S.W.2d 798, 814 (Mo. banc 1994), *cert. denied*, 1 15 S. Ct. 371 (1994).

> Movant faces a heavy burden in establishing a claim for ineffective assistance of counsel. Not only must the defendant prove his or her allegations by a preponderance of the evidence, but the defendant must overcome the court's presumption that counsel is competent.

Yoakum v. State, 849 S.W.2d 685, 687 (Mo. App. 1993) (citations omitted). Reasonable trial strategy will not support an ineffective assistance of counsel claim. *Harris*, 870 S.W.2d at 814.

To be entitled to an evidentiary hearing, 1) a movant must allege facts, not conclusions, which, if true, would warrant relief; 2) the facts must raise matters not refuted by the record; and, 3) the matters complained of must have resulted in prejudice to the movant. *Driver*, 912 S.W.2d at 55.

A. FAILURE TO CALL A MATERIAL WITNESS

Appellant first alleges that he was denied effective assistance of counsel because his trial counsel failed to investigate and call a witness to testify who was material to his defense. Appellant contends that a reasonably competent attorney would have called as a witness appellant's co-defendant, Reginald Rhodes. We disagree.

The courts have held that attorneys may decide which evidence and witnesses to use at trial as a matter of trial strategy. *State v. White*, 870 S.W.2d 869, 875 (Mo. App. 1993), *citing Leisure v. State*, 828 S.W.2d 872, 875 (Mo. banc 1992), *cert. denied*, 506 U.S. 923, 113 S. Ct. 343, 121 L. Ed.2d 259 (1992). As such, the attorney's decision making is

"virtually unchallengeable." *White*, 870 S.W.2d at 875. Appellants claiming ineffective assistance of counsel on the basis of witness selection must not only show that the witness would have testified if called, but that this testimony would have been of benefit to the appellant. *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995). "If counsel believes that the witness's testimony would not unqualifiedly support the defense, the decision of whether to call the witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel." *Id.* The record here clearly reflects the misgivings appellant's attorney had in presenting Rhodes as a witness, and appellant has not persuaded us that Rhodes' testimony would have aided his defense. It is reasonable to infer that appellant's attorney determined that Rhodes, as a convicted murderer, would have had little credibility with the jury, and that his testimony would not have changed the outcome of the case.

As to appellant's assertion that his attorney failed to even investigate the possibility of Rhodes as a witness, this argument similarly fails. The failure to investigate a witness that a defendant has chosen not to present will not result in a finding of ineffective assistance of counsel. *Eberspacher v. State*, 915 S.W.2d 384, 387 (Mo. App. 1996). At his sentencing, appellant stated that Rhodes had agreed to testify that appellant had nothing to do with the victim's shooting, and that he wanted to have Rhodes testify to that effect. However, appellant's testimony at his sentencing hearing indicates that he and his attorney had discussed, but rejected the possibility of calling Rhodes as a witness. Appellant specifically testified that his attorney advised against calling Rhodes as a witness, and appellant acknowledged that he knew in advance the witnesses his attorney intended to call. Appellant cannot now claim ineffective assistance of counsel when the record reflects that he agreed and understood the witness in question would not testify.

We find that the record conclusively shows that the appellant is not entitled to postconviction relief, and that the motion court's finding that appellant did not prove that failure to call Rhodes as a witness was something other than trial strategy was not clearly erroneous.

B. DENIAL OF MOTION FOR CONTINUANCE

Appellant next alleges that he was denied effective assistance of counsel when the trial court overruled appellant's motion for a continuance. Appellant asserts that although his counsel did attempt to locate the missing witnesses, the outside forces that interfered with his attorney's preparation of the case rendered his representation ineffective. In *State v. Twenter*, 818 S.W.2d 628, 637 (Mo. banc 1991), the court held that to establish a claim for ineffective assistance of counsel where a witness does not testify, an appellant must show that his counsel is responsible for the failure of a witness to appear and testify. In his motion, the appellant does not allege any fault of trial counsel for the sudden disappearance of the witnesses in question that would establish ineffective assistance of counsel. The trial court found that appellant did not meet his burden of proof by producing any evidence to show that his trial counsel was in any way at fault for the disappearance and unavailability of the witnesses in question. We find that the trial court's findings to that effect are not clearly erroneous.

The record conclusively refutes that appellant is entitled to postconviction relief as claimed. Thus, we find that the motion court's findings and conclusions in denying postconviction relief without an evidentiary hearing are not clearly erroneous.

Point II denied.

CONCLUSION

The judgment of conviction and order denying appellant's Rule 29.1 5 motion are affirmed.

[Filed Jan. 16, 1998]

98-0074 CV-W8-P

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PERSONS IN STATE CUSTODY APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. SECTION 2254

Name : Remon Lee
Prison Number: 167441
Place of Confinement: Crossroads Cor. Cntr.
United States District Court Western District of Missouri
Case No: _____ (to be supplied by Clerk of the U.S. District Court)
Remon Lee PETITIONER v.
Mike Kemna RESPONDENT
(Name of Warden, Superintendent, Jailer, or authorized person having custody of petitioner.)
and
THE ATTORNEY GENERAL OF THE STATE OF Missouri

ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, petitioner should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

Instructions - Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Clerk of U.S. Courthouse, 811 Grand Ave., Kansas City, Missouri 64106

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Circuit Court of Jackson County, Missouri, KCMo
2. Date of judgment of conviction: February 24, 1994
3. Length of sentence: Life without Parole
4. Nature of offense involved (all counts): Murder 1st degree
5. What was your plea? (Check one)
   (a) Not guilty _x_
   (b) Guilty ___
   (c) Nolo Contendere ___

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

6. Kind of trial: (Check one) (a) Jury _x_ (b) Judge only ___
7. Did you testify at the trial? Yes [ ] No [x]
8. Did you appeal from the judgment of conviction Yes [x] No [ ]
9. If you did appeal, answer the following:
   (a) Name of court: Missouri Court of Appeals, Western District
   (b) Result: Affirmed
   (c) Date of result: Mandate issued January 23, 1997

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes [x] No [ ]

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court: Circuit Court of Jackson County, KCMo.

    (2) Nature of proceeding: 29.15

    (3) Grounds raised: Ineffective assistance of counsel

    see attached 29.15 motion

    (4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [x]

    (5) Result: Conviction Affirmed

    (6) Date of result: 8/21/95, findings & facts issued

    (b) As to any second petition, application, or motion give the same information:

    (1) Name of court: Missouri Court of Appeals, Western District

    (2) Nature of proceeding: Direct Appeal

    (3) Grounds raised: Abuse of Judicial Discretion; Denial of Continuance, failure to instruct on Alibi defense (see attached brief) ineffective assistance of counsel, denial of 29.15 without evidentiary hearing, (see attached brief)

    (4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [x]

    (5) Result: Conviction Affirmed

    (6) Date of result: 1/23/97

    (c) As to any third petition, application, or motion, give the same information:

    (1) Name of court: Motion for new trial, jackson county circuit court

    (2) Nature of proceeding: Judgement of Acquttal

    (3) Grounds raised: Insufficiency of evidence, Abuse of Judicial discretion; Denied right to be tried by Impartial trier of facts (see attached motion for new trial)

    (4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [x]

    (5) Result: motion denied

    (6) Date of result: filed March 7, 1994

    (d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

    (1) First petition, etc. Yes [x] No [ ]

    (2) Second petition, etc. Yes [x] No [ ]

    (3) Third petition, etc. Yes [x] No [ ]

    (e) If you did not appeal from the adverse action on any petition, application, or motion, explain why you did not:

    Lawyer did not appeal the decision of denying the new trial motion

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

    The state forced counsel on me against my will and the state denied me my right to be tried by an impartial trieer of facts

    (see attached) denied right to effective direct appeal counsel; denied due process right to a fair trial; improperly instructed jury (see attached)

A. Ground one: STATE FORCED COUNSEL ON ACCUSED

Supporting FACTS (tell your story briefly without citing cases or law):

First I had a paid lawyer, who withdrew for conflict, as witness; I spoke to another private attorney, who gave me a few weeks to secure the retainer fee, However the state forced unwanted public defender on me (see attached)

B. Ground two:

DENIED IMPARTIAL TRIER OF FACTS

Supporting FACTS (tell your story briefly without citing cases or law):

the judge belittled my unwanted counsel in front of the jury, causing them to laugh and disbelieve anything he said (see attached)

C. Ground three: PROSECUTORIAL MISCONDUCT

Supporting FACTS (tell your story briefly without citing cases or law):

The prosecutor instructed the court officer to have my alibi witnesses to wait outside the courtroom, THEN told them that their testimony wouldn't be needed until the following day, and then after they left the prosecutor rushed the state witnesses, and told the court my witnesses left

see attached

D. Ground four: INSUFFICIENCY OF EVIDENCE

(see attached)

Supporting FACTS (tell your story briefly without citing cases or law):

E. Ground five: Improper sentence (see attached)

A.

STATE COURT ERRED IN FORCING PETITIONER AGAINST HIS WILL TO ACCEPT A STATE APPOINTED COUNSEL

QUESTION:

Whether, a State may Constitutionally, hale a person into its criminal courts and there force a lawyer, not of his choosing, upon him, against his will?

RULE:

8th Cir. *Chamberlain v Ericksen*, 744 F2d 628, 630, Says, "Whether at trial or appeal a defendant is not required to accept unwanted counsel.

Adams v United States ex rel. McCann, 63 Sct 236, 241, The Court recognized that the 6th Amend. right to the assistance of counsel IMPLICITLY embodies a '*correlative right* to *dispense* with a lawyers help'. . . . When the administration of the criminal law . . . is hedged bout as it is by the Constitutional safeguards for the protection of an accused, TO DENY him in the exercise of *his free choice* the right to DISPENSE with some of these safeguards. . . is to imprison a man in his privileges and call it the Constitution. 63 Sct @ 241-242.

APPLICATION, CASE AT BENCH:

Petitioner retained counsel aprox., February of 1993, by October 1993 [pet'] became displeased with the services of Mr. Calbi [the retained counsel]. Pet' then wished to exercise HIS RIGHT to discharge the retained counsel. *Mo.Sct.rule 4, Rule 1.16* subsection1, and *comments* to rule 1.16, states: a Client has a right to discharge a lawyer at anytime, with or without cause, subject to liability for payment of the lawyers services. October 22, 1993 [Pet'] filed a pro se motion to discharge Mr. Calbi. In this motion the court was informed that NEW DESIRED counsel

would be *TOM SHANAHAN*. [*see pro se* motion to dismiss counsel in court file]

On November 19, 1993, a hearing was held before Judge Shinn to address the belief of Petitioner that there was an irreparable breakdown in the attorney client relationship between pet' & attorney Calbi, who subsequently filed additional suggestions to withdraw. Counsel stated that continuing representation will result in a violation of the rules of professional conduct or of law; which should be accepted as sufficient.

Judge Shinn, denied the motion of Petitioners to discharge attorney Calbi, and Judge Shinn also denied the motion of attorney Calbi to withdraw. So in essence, what Judge Shinn did was VIOLATE Petitioner's right TO DISPENSE COUNSEL, at the same time FORCE *unwanted counsel* upon Petitioner. A counsel that no longer had the desire to represent Petitioner, which is what happen, it left petitioner without representation.

Subsequently, Judge MASON, appointed James McMullin to represent Petitioner aproximately 2 months before trial, which was held February 23-24th, 1994. Although Petitioner explained to the court that he wished to hire a lawyer now that Mr. Calbi is allowed to be discharged from representing him [Pet'] on the case. However, the court appointed Mr. McMullin inspite of the pro se motion naming *TOM SHANANHAN* as counsel of choice.

Again, Petitioner was *FORCED BY THE STATE TO ACCEPT UNWANTED COUNSEL*, who not only did not have time to investigate but botched his *Alibi defense*, as clarified infra.

Therefore, the state should not have been allowed to force unwanted counsel upon Petitioner, Counsel of Choice *TOM SHANAHAN*, would have produced a different result.

CONCLUSION:

Section 35 of the *Judiciary Act* of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the 6th Amendment was proposed, provided that 'in *all* the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel . . . .' The right is currently *codified* in 28 USC § 1654. *See also, Mo. Constitution Art* 1 § 18(a), grants the accused the right to be heard, or to defend, in person and by counsel.

Surely this includes counsel of choice. This counsel James McMullin was not even aware that Reginald Rhodes had *pled guilty to* this very same shooting. And the court was under the impression that Reginald Rhodes was tried and found guilty. *Pet' Ex.A.1*, [Sentencing **13-14.

Examination by Mr. McMullin:

Q What was the name of the witness that you say had pled guilty?

A Reginald Rhodes . . . . he said that he would come to court and testify that I had no involvement in this crime, that I wasn't present, that I had no knowledge of it.

The Court:

Mr. McMullin, my [Judge Anthony P. Nugent] recollection of it is that *Rhodes* was tried by a *jury* and was *found guilty*, is that correct?

Mr. McMullin:

No. He pled guilty I THINK.

Its troubling, that a man is on trial for 1st degree murder and neither the Judge who is the *referee* nor the defense counsel who is the *guardian of freedom*, knows for sure if Petitioner is wrongfully tried for a charge that someone has

already pled guilty to. Reginald Rhodes could have simply been subpeona to court to clear Petitioner, had Forced counsel paid attention to Pet'. Further, the counsel that the *State forced on petitioner*, told the jury that the defense would be a *Defense of Alibi* during voir dire, attached as Petitioner [Ex A-2] trial trans.** 114-115, & 122. . . .

Mr McMullin:

> . . . "there will be a *defense of alibi* in this case . . . it is a valid legitimate defense, if you find it so, that he was not at the scene, was not even in town at the time. And *we'll put on evidence* . . . that he [Pet'] was somewhere else, he couldn't commit the crime and I *believe* the JUDGE WILL GIVE INSTRUCTIONS ON ALIBI at the conclusion of my case.

Noteworthy:

The Judge never instructed on alibi to the jury, and failed to instruct the jury that failure to prove alibi is not evidence of guilt.

And

> [Ex A-2,*122] Mr McMullin goes on to say: "Does anyone know GLADYS EDWARDS? LAURA LEE? MR JAMES EDWARDS? . . . a MINISTER . . these people drove from California to testify in support of the alibi defense. That Petitioner was in California at the time of this shooting death of Mr Shelby, in fact minister Edwards picked [pet'] up from the airport.

Noteworthy:

These people drove for over 1,000 miles and spent over $1,000 dollars of their own money to come clear Petitioner [with baggage & plane receipt to show Pet's arrival and departure to and from California].

OPENING STATEMENT:

Mr McMullin again pressed to the jury that the defense will be ALIBI DEFENSE, attached as Pet' Ex.A-3, [TT** 194-197], Mr. McMullin [counsel state forced upon pet'] goes on to say, "the next part of defense evidence will be, as I talked to you earlier, called an alibi. We WILL put on *three* (3) *witneses* for the defense, and you will see them and be able to evaluate them . . . YOU WILL HEAR, Mr James Edwards, Gladys Williams, and Laura Lee, essentially their testimony will be:

> "that Remon [Pet'] was in California from July through October 1992, they [meaning the witnesses] picked him up from the airport, in July for family gathering, combined birthdays of Remon [Pet'] & Lauras daughter, the birthdays fall on the 9th & 10th of July. They remember Remon [Pet'] being there in California in October, because they begged him to stay for the Holloween party on October 31st. Further, that Mr Edwards [minister] is the one who took Remon [Pet'] to the airport for depature." etc.

This counsel that the *State Forced upon Petitioner*, made all these promises to the jury, and did not fullfill a one of them, viz:

a. he did not present the witnesses for alibi as promised;

b. he did not have the judge read Alibi instructions to the jury;

c. The 3 Alibi witnesses were sequestered to the witness room, awaiting the conclusion of the states evidence;

d. he allowed the prosecution to authorize the excusal of defense alibi witnesses for reasons: their [alibi witnesses] testimony would not be needed until the following day, that the states evidence would take up the remainder of that day;

e. allowed the state to cut short their witness testimony and demand the testimony of defense alibi witnesses [knowing they had been excused]

f. allowed the Judge to deny a continuance for *personal* reasons, instead of *judicial* reasons, without taking measures to protect his client.

This prevented the jury from being presented with live testimony; prevented the Petitioner from putting forth his *alibi* defense. The state forced counsel on Petitioner then forced Petitioner to sit and watch his only means of clearing himself, be *excused* by the state while his counsel did absolutely nothing.

TOM SHANAHAN, THE attorney Petitioner informed the court in his motion to discharge Mr Calbi, that he *desired* to represent him, *would not* have allowed the prosecutor to *interfere* with the defense function by tampering with the alibi witnesses, *Nor* would he have allowed the trial judge to place his personalism before his judicial responsibility to be an impartial referree. Tom states he would have immediately filed a Writ of Prohibition, *immediately argued*, requested proper jury instructions, moved for a mistrial for interfering with the Administration of Justice to name a few.

Had the state not been allowed to *force unwanted counsel* on Petitioner, this miscarriage of Justice would not have happened, and this conviction would not be on Petitioners record. A conviction that Reginald Rhodes has already pled guilty to.

WHEREFORE, Petitioner ask that this court to find that the state did in fact force unwanted counsel on Petitioner, that the Constitution says accused may not be forced to accept unwanted counsel, and that had Tom Shanahan been allowed to represent Petitioner, the results of the trial would have been different and Vacate the judgement and reverse the case for proper proceedings with proper counsel. It is ridiculous to tell a man that he can spend his money to hire a lawyer but may not fire the lawyer that he has hired with his own money, or force unwanted counsel on an accused.

GROUND B.

DENIED IMPARTIAL TRIER OF FACTS

ISSUE:

Petitioner is in custody in violation of the Constitution or laws . . . of the United States, 28 USC § 2254(a), he was *tried before a biased judge*, and therefore is entitled to habeas relief.

RULE:

Structural error, requires automatic reversal, *Chapman*, specifically noted three constitutional errors that could not be categorized as harmless error: (1) using a coerced confession against a defendant in a criminal trial, (2) depriving a defendant of counsel, and (3) *trying a defendant before a biased judge*, [as done in case at bench.]

APPLICATION, CASE AT BENCH:

A. TRIAL JUDGE IMPROPERLY INJECTED HIMSELF INTO THE CASE, RIDICULING DEFENSE COUNSEL TO THE JURY, GIVING THE IMPRESSION HE WAS FOR THE PROSECUTION

B. TRIAL JUDGE IMPROPERLY PLACED HIS PERSONAL PRIVATE INTEREST, BEFORE HIS DUTY TO PLACE JUDICIAL INTEREST OF BEING AN IMPARTIAL REFEREE, IN HIS HARSH DENIAL OF DEFENSE REQUEST FOR CONTINUANCE & PREJUDICED THE PETITIONER.

C. EXPOSED TO OUTSIDE SOURCES, THUS SAT DURING THE TRIAL WITH THE RECOLLECTION THAT REGINALD RHODES HAD BEEN TRIED BY A JURY AND FOUND GUILTY

GROUND B.A

AB INITIO:

From the beginning the trial judge belittled the unwanted counsel, in front of the jury causing them to laugh and disbelieve anything the counsel said viz;

> Trial judge *took over* the questioning of States witness, Willie Sanders, and asked him if he was positive he could identify the defendant [pet'] where-upon the witness testified he was positive the defendant was the driver of the truck [although previously could not I.D. the driver], the trial judge then asked whether or not either lawyer had additional questions, and when defense [unwanted, state forced] counsel responded "I do" the court stated [in a sarcastic manner] "I'LL BET YOU DO" *causing the jury to break into laughter.*

This comment by the judge to defense counsel "I'll bet you do" in response to [his own] the judges question, "Does counsel have any further questions?" was improper and highly inflammatory, misleading and not the way to appear impartial in a *1st degree murder trial.*

The entire conduct of the trial and the first impression on the jury by the trial judge as to whether he appears impartial, obviously affects both the verdict and how the jury will view the evidence presented by both state and defense. Without the protection of a fair referee, who is to call a foul when a fould blow is made by the prosecution such as incase at bench, the excusing of alibi witnesses, thus stripping Petitioner of a defense. If the judge is laughing at the defense and causing the jury to laugh how can the rest of the trial be fair.

GROUND B.B

TRIAL JUDGE PLACED HIS PERSONALISM BEFORE HIS JUDICIALISM IN HARSH DENIAL OF REQUEST FOR CONTINUANCE

ISSUE:

Reasons trial court gave for the denial of continuance were PERSONAL, stating: "[M]y daughter is going to be in the hospital all day . . . So I've got to stay with her . . . its's too bad. The Court will not [Tr *580] be able to be here tomorrow to try the case." Overruling the motion for continuance the court then submitted the case to the jury *WITHOUT ALIBI INSTRUCTIONS* and more troubling, without the testimony of alibi witnesses, Laura Lee, Gladys and James D. Edwards.

The reason the continuance was requested is because:

1. the defense was alibi; [as previously stated herein
2. the alibi witnesses were under subpeona for the defense, had been present in the courthouse that morning, left around lunch time, under the direction that their testimony would not be needed until the following day. [Tr. 571-77]
3. It is obvious after driving from California at their own expense, they were willing to testify.

RULE:

Flynt, 756 F2d 1352, 1358, Petitioner must show at *minimum*, he suffered prejudice. In determining whether trial court abused its discretion in denial of continuance, Federal Courts analyze the following factors: (i) extent of defendants diligence in readying his defense prior to date set for hearing, (ii) likelihood that continuance would serve a useful purpose, (iii) whether the continuance would

inconvenience the parties, the court or other witnesses, (iv) the critical question is whether defendant was prejudiced by the courts refusal to grant his request for continuance.

APPLICATION, CASE AT BENCH:

(i) DILIGENCE:

Case at bench, the need for continuance was not due to defendants lack of diligence but rather, to the prosecutorial misconduct, claiming it would take the remainder of that day to present its case and state witnesses, [attached as Petitioners *Ex. BB*] STATES RESPONSE TO RESPONSE TO REQUEST FOR DISCOVERY, in pertinent part, [**1-3], which shows a witness list of (23) twenty-three state witnesses, which *understandably* would take up the rest of the day, . . . HOWEVER, the prosecutor instructed an officer to excuse the alibi witnesses who were sequestered in the witness room, giving the reason that their alibi testimony would not be needed until the following day.

After the alibi witnesses, followed instructions and left [not imagining someone would interfer with the administration of justice by misleading them [the alibi witnesses] into leaving without testifying, after driving 1,000 miles and spending $1,000. dollars of their own time and money.

The state then *cut short* their witness list and witness testimony, thus placing the defense in position to present testimony that was absent. Instead of the referee [trial judge] calling *foul*, and granting a continuance as judicial duty to protect the accused right to put forth a defense, compulsory process for obtaining witness, the DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL TRIAL, the court was suppose to be the guardian of those rights in its own forum.

(ii) USEFULNESS:

The continuance would have allowed the alibi witnesses the consideration they deserved after traveling a thousand miles to testify, by allowing them to do just that TESTIFY. It would have allowed the Petitioner the right to put forth a defense of *alibi* as defense counsel promised the jury. It is most likely that a *reasonable* and properly instructed jury would have found Petitioner not guilty, inlight of the weakness of the states case.

The live testimony, would have shown that Petitioner was not even in town, combined with the testimony of Reginald Rhodes [who already pled guilty] also clearing Petitioner of any involvement. The alibi witnesses could account for Petitioners whereabouts on the day in question.

U.S. v POPE, 841 F2d 954, 957, and *Flynt*, requires showing relevence of the missing testimony, and that nothing more should be required, to demonstrate usefulness of continuance. *Case at bench*, the continuance would indisputably have served a useful purpose, the promised *alibi defense & alibi witnesses*.

(iii) INCONVENIENCE:

The only complaint of inconvenience came from the referee [trial judge] himself. That his PARENTAL responsibility comes before his JUDICIAL responsibility. *With all respect*, the daughter of trial judge was to be hospitalized all day the next DAY, however, Petitioner is sentenced to be CONFINED ali his life because the judge chose not to be impartial, no matter what reason or excuse was given, a *miscarriage of justice_has occurred*. The judge did not take under consideration the inconvenience of the alibi witnesses taking out their time to travel from Ventura . . . . California, to do their Civic Duty and testify.

The trial judge could have, attempted to find another judge to preside over the remainder of Petitioners trial, while he [the trial judge] was visiting with his daughter at the hospital. His judicial duty were equally compelling after all he took an oath, not to be breached lightly, especially at the sacrifice of rights he is suppose to protect.

At minimum, the trial judge should have granted the continuance for a few hours, and investigating the prosecutorial misconduct. [It doesn't make sense for the witnesses to travel so far and then . . . not be allowed to testify]. This Abuse of discretion, and reasons were strictly personal on the part of the judge, to the prejudice of Petitioner.

(iv) PREJUDICE:

The most critical question, whether Petitioner was prejudiced by trial courts refusal to grant continuance. The prejudice in case at bench, is obvious by the guilty verdict and excessive sentence by a trial without fundamental fairness. The denial of continuance prevented [pet'] from the right to put forward his *alibi defense*, In *U.S. v Pope*, court held: "DEFENDANT WAS PREJUDICED WHERE denial of brief continuance prevented him from introducing "the *only* testimony that could *plausibly* have helped him."

U.S. v 2.61 Acres of Land, 791 F2d 666, 671, finding prejudice where denial of continuance *prevented* defendant from introducing *any evidence* on its behalf. *Armant v Marquez*, 772 F2d 552, found prejudice where denial of continuance effectively denied defendant the opprotunity to prepare his own defense.

Case at bench, provides a more than persuasive explanation of how the denial of continuance adversely affected him, the defense was alibi and the denial of continuance STRIPPED HIM OF THAT DEFENSE inter alia. So given the importance of the alibi witnesses that were not allowed

to testify, and particularly the fact the outcome turned to the credibility of state witnesses, who were inconsistent in there ability to identify the driver of the truck [if in fact there ever was a driver], faliure of the court to grant continuance to allow alibi witnesses, to impeach state witnesses, and prove the innocence of petitioner. The trial court in essence denied [pet'] Due process right to a fair trial in front of an IMPARTIAL TRIER OF FACT.

CONCLUSION:

Clearly, it can be drawn that the petitioner was DENIED IMPARTIAL TRIER OF FACTS. The only way for [pet'] to prevail was to convince the jury that the states version was untruthful, that perhaps ulterior motives existed. That in fact he was not present, because the continuance was denied, the jury was compelled to make a decision without hearing the testimony of critical alibi witnesses.

Consequently, the [pet'] was deprived of the process to which he was entitled, a process designed to safeguard his interest and ensure a fair trial & proper result. Because the testimony of *key* witnesses were involved, the deprivation was substantial and under these circumstances, the prejudice requirement set forth in *Flynt*, and other relevant cases is met. *See Martel*, 56 F3d 993 (1995).

U. S. v Meija, 69 F3d 309 [footnote 11], Where denial of continuance directly affects a defenants ability to present evidence, we do not require "the clearest showing of actual and substantial prejudice"

This denial in the *case at bench*, amounted to A CONVICTION AFTER PROCEEDING IN WHICH NO JUDICIAL DISCRETION WAS EXERCISED, and constitutes Structural Error, and is not subject to harmless error analysis, *Riley v Deeds*, 56 F3d 1117.

WHEREFORE, Petitioner respectfully ask this court to reverse his unlawful conviction and sentence and remand the case at bench for a trial as guaranteed by the Due Process Clause of the United States Constitution.

GROUND B.C

JUDGE EXPOSED TO OUTSIDE SOURCES

EVIDENCE ALLIUNDE:

As evidenced by the trial judge's own statement on record at sentencing [supra Ex. A.1] THE COURT: "Mr. McMullin, my recollection of it is that Rhodes was tried by a jury and was found guilty, is that correct?"

It is very possible, the trial judge being in this state of mind, sitting as trier of, disbelieved the petitioner's version that Mr. Rhodes was willing to come and testify to the truth, being Petitioner had nothing to do with the shooting of Mr Shelby and that he [meaning] Mr Rhodes in fact had pled guilty to the shooting. The trial judge may further have thought a continuance would be a waste of time, since he was under the impression that the claims of [Pet'] that Mr. Rhodes *pled guilty* was a LIE!

Further, without being in an *impartial* state of mind, denied the continuance for the alibi witnesses, being already convinced that you only have to prove a person a lier once. And he proved petitioner a lier, when petitioner claimed Mr. Rhodes pled guilty, when the trial judge [from extrajudicial sources] was under the impresssion Mr. Rhodes went to *jury trial*, if that be true then that would make petitioner a lier.

CONCLUSION:

It can clearly be concluded that: (1) the judges impartiality is questionable; (2) that impartiality was affected by the understanding he [trial judge] obtained from outside sources, and (3) it had effect on his decision to grant or deny the continuance. Had the judge not already been under the impression that [Pet'] was a lier, it is most likely that he would have granted the continuance and protected the right to put forth a defense

as promised by the counsel that the *state forced upon petitioner to begin with*, the defense of alibi, with the witnesses that traveled all the way from California.

WHEREFORE. Petitioner asks that his case be remanded before a different judge for proper proceedings. Because the previous judge Abused his discretion for the reasons herein stated and denied his due process rights to a fair trial, before an impartial trier of facts. Before a judge who's state of mind is not preconceived by a false recollection of facts that did not occur.

GROUND C.

PROSECUTORIAL MISCONDUCT

Petitioner asserts that the herein acts of prosecutorial conduct, so infected the entire trial process as to render his trial fundamentally unfair. That claims of prosecutorial misconduct are cognizable in federal habeas corpus review. The Specific acts complained of are as follows:

CLOSING ARGUMENT:

[*619-20, Tr] prosecutor tells the jury, "That last little speech that Mr McMullin [def' counsel] made, about this being the weakest case he's seen in his 40 years of experience, *he said that in the last case I tried with him too*."

In other words, the prosecutor was telling the jury that defense counsel is trying to FOOL them, the prosecutor accused defense counsel of FOOLIN the jury. [that in itself is reversible error] Defense counsel responded that he didn't even remember ever trying another case with the prosecutor in the case at bench. [so who was foolin who] clear prosecutorial misconduct placing the minds of the jury on the defense against defense counsel who already was made a laughing joke by the trial judges

sarcastic remark Ab Initio [supra]. Further, the jury looked at the defense counsel as a lier promising to put forth an alibi defense along with *alibi witnesses*. So the misconduct of the prosecutor telling the jury that defense counsel was only trying to fool them with a line she heard before in a previous trial, did without question *taint* the jury's mind even more.

and

[Tr *624], the prosecutor argued to the jury that [pet'] "NO DOUBT" was in town on August 26 & 27, 1992, based on the *lack of alibi testimony*.

The prosecutor took advantage of a situation that was created by misconduct of the prosecutor in the first place, designed to intentionally strip the [pet'] of a defense, viz:

OBSTRUCTION OF JUSTICE:

1. Detective Garry Wantland, interviewed the defense Alibi Witnesses on the 1st day of trial at the instructions of the prosecutor, to learn what the trial testimony would be, [Tr **573-82].

2. After learning their testimony would put a hole in the states case, the prosecutor pulled a joker out of the deck. She first submitted a witness list of 23 witnesses for the state, indicated that the state's case would take up the remainder of the day.

3. Authorized the excusal of defense witnesses from sequestered witness room. Then cut her case short. Although she did not object to the request for continuance by defense. Her job was to SEEK JUSTICE, THE TRUTH.

Clearly, shw should have wanted the witnesses to testify, to make sure she was not convicting the wrong person.

CONCLUSION:

It can be concluded that the prosecutor in this case was not after justice, was not seeking the truth, or functioning under the dual powers of the prosecution to make sure the proceeding was a fair one, for the petitioner. The misconduct shows a pattern that raises questions. Why would she tell the jury that defense counsel was trying to fool them. Why would she indicate to the jury that she tried a case with defense counsel before & he used the same line, when she knew all the time she never tried a case with the defense counsel. And Why would she have the alibi witnesses to leave before testifying knowing that the defense counsel was tied up in trial, finally why would she allow the judge to sit through . . . an entire trial that she [prosecutor] had no intentions of being a fair trial. She knew all along that the alibi was not going to be presented, she needs to be taught the difference between a *hard blow* and a *foul blow*.

WHEREFORE, petitioner ask this court to inform her that foul blows will result in a reversal of her wrongful convictions, thus ask this court to reverse for the claim of prosecutorial misconduct.

GROUND D.

INSUFFICIENCY OF EVIDENCE

Petitioner acknowledges that his trial counsel preserved and attacked that there was insufficient evidence, as well as his post conviction 29.15 counsel and also his first direct appeal counsel stated there was insufficient evidence to convict, and petitioner will include these documents in his traverse.

However, petitioner wants the courts to know that his appellate counsel failed to argue on appeal the federal constitutional standard for insufficient evidence.

GROUND E.

IMPROPER SENTENCE

Petitioner wishes to bring to the courts attention that he will prove his innocence nevertheless, he wishes the court to know that if he was allegedly found guilty and sentenced as aider & abetter, then why did the alleged principal receive less time. Petitioner asserts that the sentences should have at minimum been the same.

GROUND F.

EXCLUSION OF EVIDENCE

Petitioner contends that the trial court violated his right to due process, when it precluded him from presenting any testimony from his alibi witnesses, by the denial of continuance and this prevented him from putting forth a defense [th]at was promised to the jury. This denied petitioner a fair trial, because the testimony would have shown the jury that he was not in town.

2ndly,

Trial court precluded him from presenting to the jury the testimony of Reginald Rhodes, who already pled guilty to the offens and this denied petitioner a fair trial and due process.

GROUND G.

DENIED FAIR TRIAL

Petitioner asserts, that the cumulative and combined effect of the above errors rendered his trial fundamentally unfair in violation of his due process rights as guaranteed under the 14th Amendment.

CONCLUSION:

Petitioner contends that the combined & cumulative effect of the stated claims: State forced counsel on accused; Denied impartial trier of facts; prosecutorial misconduct; Insufficiency of evidence; Improper sentence; Exclusion of evidence; and a fundamentally unfair trial overall, sufficiently states a claim for habeas review.

Respectfully submitted,

/s/ Remon Lee
REMON LEE

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

ground A, forced counsel was not raised because the appellate counsel failed to raise it. Ground C, because the appellate counsel failed to raise it. ground E. because the appellate counsel failed to rainse it.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes [ ] No [x]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing n/a

(b) At arraignment and plea Robert Calbi, 912 Baltimore, Suite 400, KCMo

(c) At trial James McMullin, 1125 Grand Ave, suite 610, KCMo 64106

(d) At sentencing James McMullin (supra)

(e) On appeal Susan Hogan (P.D. office) KCMO

(f) In any post-conviction proceeding Susan Hogan (supra)

(g) On appeal from any adverse ruling in a post-conviction proceeding. Susan Hogan (supra)

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time? Yes [ ] No [x]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes [ ] No [x]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing any petition attacking the judgment which imposed the sentence to be served in the future? Yes [ ] No [ ]

Wherefore, petitioner prays that the Court grant petitioner relief to which petitioner may be entitled in this proceeding.

_____
Signature of attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 12-30-97
(date)

/s/ Remon Lee
REMON LEE
Signature of Petitioner

/s/ Daniel J. Greene
Daniel J. Greene
Notary Public/Notary Seal
State of Missouri
County of Illegible
My Commission Expires 3/27/2000

IN THE
UNITED STATES DISTRICI' COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

98-0074-CV-W-8-P

REMON LEE,

Petitioner,

VS.

MIKE KEMNA,

Respondent.

AFFIDAVIT AND STORY OF PETITIONER

I REMON LEE, being truly sworn, states under oath as follows:

1. My name is Remon Lee. I am over 21 yrs of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At alltimes pertinent hereto, I am the Petitioner in the case at bench, and my personal account of events goes as follows:

I was incarcerated in prison from 1988 until 1991; at which time I was paroled to Kansas City, Missouri.

Around May of 1992, I caught an assault case in Kansas City. The first part of June 1992 my parole officer put a warrant out for my arrest.

I could not give my parole officer any type of explanation, it was back to the joint, period. My Parole officer new I was under pressure from, being placed back into the same environment.

I repeatedly, expressed to my Parole officer that I wanted to visit my mother in California, since I hadn't seen her since 1988. I was told that I would be given a travel permit, although this never seemed to happen.

So, after I caught the assault case, I said to myself, I might as well go and see my mother and spend the Holliday & family gathering with the family before going back to prison. So I went to California & spent the birthday reunions and Holloween with my mother & family in California.

I Then said I'll spend Thanksgiving & Christmas with my Woman, before dealing with the parole violation. And I did this, with the exception of Christmas, because I was arrested at my Womans house the day after Thanksgiving. The assault case was in no way connected with the shooting death of Mr Shelby.

The testimony of my family, who did travel from California, coupled with the testimony of Reginal Rhodes, would have informed the jury of this and cleared me of these charges, if the Judge & the prosecutor would have allowed them to testify.

I, Remon Lee, hereby certify that the above facts are true & correct, pursuant to 28 *USC § 1746*, Federal Rules of Evidence, Rule *1004(3)*.

Executed on:
December 30 , 1997

Signature: /s/ Remon Lee
REMON LEE

[Filed Feb 20, 1998]

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 980074-CV-W-8-P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

MOTION TO INCLUDE DOCUMENTS

COMES NOW, Remon Lee, Petitioner, Proper Person, and motions this court to include the following documents:

1. Affidavit of Reginald Rhodes: *Exhibit #1*

   This affidavit supports [Pet's], contention that, contrary to the trial courts state of mind, Mr. Rhodes did in fact plead guilty to the death of Mr. Shelby; was willing to testify and Clear [Pet's] name of any involvement. That [Pet'] is innocent of these charges; *inter alia*.

2. Affidavit of Laura Lee: *Exhibit #2*

   This affidavit supports [Pet's], contention that: his witnesses did not abandon him; that they left the courthouse on instructions; that [Pet'] was in fact in California, and did have an alibi defense, *inter alia*.

3. Affidavit of Gladys Edwards: *Exhibit #3*

   This affidavit supports [Pet's], contention that: his witnesses did not abandon him; that [she] also left the courthouse along with the other *alibi witnesses*, after

being instructed their testimony would not be needed until the following day; further that [Pet'], was in fact in California at the time in question, *inter alia*.

4. Affidavit of Minister James Edwards: *Exhibit #4*

   This affidavit supports [Pet's] con'ention that: his witnesses did not abandon him, but in fact left the courthouse after being instructed that their testimony would not be needed until the following day. That this witness along with the other *alibi witnesses* picked [pet'] up from the airport in California, and that [Pet'] was in California at the time in question. Pet' did have an alibi defense, *inter alia*.

5. *Exhibit A.1*- [**13-14] of the trial transcript: THE COURTS state of mind that Mr. Rhodes pled guilty, contrary to the record and the aff' of Mr. Rhodes attached as *Ex. #1*; and that [Pet'] told the court & his lawyer Mr. Rhodes was willing to testify;

6. *Exhibit A.2- [**114-115, &**122-123]*, which state in essence: trial attorney told the jury the defense will be alibi, the judge *will instruct on alibi*., the alibi witnesses will be Gladys Edwards, Laura Lee, & Minister James Edwards.

7. *Exhibit A.3*,- [**193-197], of trial transcript that states in essence: trial attorney told the jury what the testimony of the *alibi witnesses* would be, which is exactly whats on the herein affidavits. The court and state knew this because they gave a statement to the Detective on instructions from the state. (See Ex. 1-3 herein).

8. *Exhibit B.B*,- States Response to Request for Discovery, three (3) pages, this shows the *witness list of the states*, and from the list its easy to see that the trial would take longer in support of the states claim. Nevertheless, after excusing the *alibi* witnesses, the

state cut their witnesses short and did not present the testimony of all the witnesses on the list.

Petitioner, has previously referred to these documents in his pleadings and has previously alerted the court and respondent that the herein documents would be sent in a motion to include documents: for CLARIFICATION PURPOSES, for reasons stated in this and previously filed 2254.

WHEREFORE, Petitioner asks this court to accept his motion to include documents along with the attached documents.

Respectfully submitted,

/s/ Remon Lee
REMON LEE
Petitioner/Proper person

CERTIFICATE OF SERVICE:

I Remon Lee, cerify that a copy of the foregoing was mailed postage prepaid to respondent/Missouri Attorney General Office this____day of February 1998.

/s/ Remon Lee
REMON LEE

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-8-P

REMON LEE,
Petitioner,

VS

MIKE KEMNA,
Respondent.

AFFIDAVIT OF REGINALD RHODES

Reginald Rhodes, being truly sworn, states under oath as follows:

1. My name is Reginald Rhodes. I am over 21 years of age, and am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was charged with the death of STEVE SHELBY: that occurred on or about August 27, 1992, and have personal knowledge to the events concerning the death of Mr. Shelby and the conviction of REMON LEE, [in question].

3. I Reginald Rhodes was identified as the shooter [principal], by an eyewitness. I pled guilty to the shooting death of Mr Shelby, as the *lone shooter*. I was willing to testify at the evidentiary hearing and the trial of Mr Remon Lee, that:

> He was not present, nor involved in the shooting death of Mr Steve Shelby. I was told by the prosecutors office that they wanted Remon Lee, and did not care if he was involved or not.

4. I was told by my attorney that Remon Lee had witnesses to prove his where-abouts on the day and time in question. However, Remon Lee wound up getting maliciously prosecuted for a crime he was *not involved in*. He even got more time than I [Reginal Rhodes got].

5. I wish to set the record straight, and testify that Remon Lee is innocent.

I, Reginald Rhodes, hereby certify that the above facts are true and correct, I have not been coerced in any way, and I am signing this under my own free will.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to before me this 15 day of January, 1998.

/s/ Reginald Rhodes
REGINALD RHODES 500710
Jefferson City Correctional Center
P.O. Box 900
Jefferson City, Mo. 65102

/s/ Michael Thompson
Notary Public

Dated: 1-15-98

EXHIBIT 2

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 980074-CV-W-8-P

REMON LEE,
Petitioner,
vs.
MIKE KEMNA,
Respondent.

AFFIDAVIT OF LAURA LEE

I LAURA LEE, being truly sworn, states under oath as follows:

1. My name is Laura Lee. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge. At all time pertinent hereto, I was a resident of California, until recently, I moved to Dallas, Texas with my parents.

2. I know for a fact that Remon didn't have anything to do with shooting anyone on August of 1992, because Remon was in California, we hadn't seen him in so long that when he came to see us we didn't want him to leave, cause it wasn't no telling when we would see him again. I know he got to California in July for all the birthday parties we celebrate together including his own. We all picked him up from the airport cause we were all so happy to see him. I begged Remon to stay for the Holloween party in 1992. So I know he was in California from July 1992 until October 1992 because it was *my house* he was staying at. So I knew personally

when he came and left. We went all the way to Missouri to testify, they took statements from us and everything. Then those people in Missouri told us we could leave because OUR TESTIMONY would not be needed until the next day. Then they went on without US. Had Us travel all that way for nothing. It ain't right. Remon might have done some things but he ain't guilty of no crime in August of 1992.

I, Laura Lee, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 5th day of February, 1998.

/s/ Laura Lee
LAURA LEE

/s/ Norma Jean Burkins
Notary Public

Dated: February 5, 1998

EXHIBIT 3

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 98-0074-CV-W-8-P

REMON LEE,
Petitioner,

vs.

MIKE KEMNA,
Respondent.

AFFIDAVIT OF GLADYS EDWARDS

I GLADYS EDWARDS, being truly sworn, states under oath as follows:

1. My name is Gladys Edwards. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.
2. At all times pertinent hereto, I was a resident of and at: 1521 Joanne Ct., Oxnard, California, 93030-3428. The pertinent time in question being, July until October of 1992. [Oxnard, referred to as Ventura].
3. The other pertinent part being February of 1994. My personal knowledge as follows:

   1st, 1 have never had any exposure to any of my sons past court dealings. I know my boy has had trouble with the law in the past, although I'm not certain what the exact nature of that trouble has been, other than he went to prison.

   2nd, In 1992, I know my boy was released from prison and he promised he would come to see Me

[his mother], by his birthday which is July around the same time as two (2) other family members. So we usually hold a family reunion to celebrate the combined birthdays. I say usually meaning my son has been absent from the past few, due to his confinement. In *July 1992*, my son Remon Lee, kept his promise to make it to California for the Reunions, I was present when Remon was picked up from the airport in California, *July of 1992*. I further know that he was in California, all the way to *October 1992*, because we begged him to stay for Holloween.

3rd, When I heard the boy was in trouble, that he was accused of committing a crime August of 1992. I knew in my mind *this time*, the accusation was false because the boy [meaning Remon Lee, Petitioner] was in California with the family. So although I never involved myself in his court affairs in the past. My husband, daughter, and myself *traveled* from California, all the way to Kansas City, Missouri. For the *purpose of testifying at the trial of Remon*. So the people would know THE TRUTH. The boy was not involved this time. He was in California and we could vouch for him.

Finally, while we [meaning: myself, husband & daughter] were at the courthouse in Kansas City, Mo. a man who identified himself as an officer, told us that the *Judge* and *prosecutor* needs him to take a statement from us so they will know what our testimony will be and so there will be a record of our statements. So we gave a statement.

Another officer of the court told us that we will not be allowed to sit in the court-room whild the trial is going on because we are to testify and can't hear what the other witnesses are saying. So we had to remain in separate room. The officer of the court was

allfull nice. He would check on us to see if We needed anything, coffee, restroom; At one point while we were back and forth to the courthouse, it seems like the 3rd day. While we were in the separate room, the officer of the court came and told us that the prosecutor stated that the states case will again take up the remainder of that day. That Our testimony will not be needed until the following day, that we could leave until the following day. He [the court officer] told Us not to worry, the Judge knows *We came to testify*, they have Our statements, and the trial will not be over until we testify. So at those instructions we left. Later we found out, they went on without Us and finished the trial early, so We didn't know what to do after traveling all that way at our own expense, then not being allowed to do what we came to do.

I, Gladys Edwards, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 5th day of February, 1998.

/s/ Gladys Edwards
GLADYS EDWARDS
7418 Woodspan Dr.
Dallas, Texas 75232

/s/ Norma Jean Burkins
Notary Public

Dated: February 5, 1998

EXHIBIT 4

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 98-0074-CV-W-8-P

REMON LEE,

Petitioner,

vs

MIKE KEMNA,

Respondent.

AFFIDAVIT OF MINISTER JAMES EDWARDS

I MINISTER JAMES EDWARDS, being truly sworn, states under oath as follows:

1. My name is James Edwards. I am over 21 years of age, and I am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was and still is a Minister. I was a resident in California, in 1992 and 1994. I have recently moved to Dallas, Texas. My present address is: 7418 Woodspan Dr., Dallas, Texas 75232.

3. In February of 1994 my wife and I along with daughter, traveled to Kansas City, Mo. to testify at the trial of my wife's son [Remon Lee]. I gave a statement to a police officer with the Kansas City, police department that, Remon Lee was in California from July until October of 1992. I know this because I was the driver of the car that picked the boy up from the airport in California, and was the driver that took the boy back to the airport when he left

California. I was willing to testify to this and this is why we traveled from California for the trial. Further, it is True that while at the Courthouse, we were told by an officer of the court that Our testimony would not be needed until the following day, we were excused until then. We *did not travel from California to abandon the boy*, we came to testify.

I, Minister James Edwards, hereby certify that the above facts are true and correct.

Subscribed and sworn to before me this 9th day of February, 1998.

/s/ James Edwards
JAMES EDWARDS

/s/ Norma Jean Burkins
Notary Public

Dated: February 9, 1998

Petitioner Exhibit B.B.

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

Docket: A
Division No. 11
No. CR93-0453

STATE OF MISSOURI,
Plaintiff,

vs.

REMON LEE,
Defendent.

STATE'S RESPONSE TO REQUEST FOR DISCOVERY

COMES NOW the State of Missouri, by and through Assistant Prosecuting Attorney Linda Koch-Carroll, and makes the following responses to the defendant's Request For Discovery:

1. Witnesses

Reggie Williams
5047 Park
Kansas City, Missouri

Will R. Sanders
5015 Olive
Kansas City, Missouri

Anthony Anderson
6815 Monroe
Kansas City, Missouri

Eric Shelby
3010 East 61st Street
Kansas City, Missouri

Connie Wooten
5446 Swope Parkway
Kansas City, Missouri

Rhonda Shelby
6621 Askew
Kansas City, Missouri

C. Anderson
7108 Bales
Kansas City, Missouri

David Haynes
2245 East 68th Street
Kansas City, Missouri

Kathy Riley
1632 East 22nd Street
Kansas City, Missouri

Terrance Collins
3864 East 59th Terrace
Kansas City, Missouri

James Payton
Kansas City Police Department

Detective Gary Buchanan
Crime Scene Investigations Unit
Kansas City Police Department

Detective Frank Brumfield
Crime Scene Investigations Unit
Kansas City Police Department

CSI Ron Payne
Crime Scene Investigations Unit
Kansas City Police Department

Detective Gary Habelitz
Crime Scene Investigations Unit
Kansas City Police Department

Detective Joe Dresselhaus
Crime Scene Investigations Unit
Kansas City Police Department

Detective Rick Pilgrim
Homicide Unit
Kansas City Police Department

Detective Chris Jefferson
Homicide Unit
Kansas City Police Department

Detective J. Crayon
Homicide Unit
Kansas City Police Department

Detective G. Wantland
Homicide Unit
Kansas City Police Department

Detective R. Hurtman
Homicide Unit
Kansas City Police Department

Detective Acklin
Homicide Unit
Kansas City Police Department

Detective Al DeValkenaere
Homicide Unit
Kansas City Police Department

2. Statements of the Defendant

There are no statements of the defendant other than those contained in the police reports.

3. Grand Jury Proceedings

There are no existing transcripts of any Grand Jury proceedings related to this offense.

4. Preliminary Hearing Transcript

There is no existing transcript of the Preliminary Hearing.

5. Experts

The State at this time intends to use the expert testimony in the trial of this case of the following:

Dr. Overman, Jackson County Medical Examiner's Office;

Karen Smith, Fingerprint Identification Unit; and

Ballistics expert from the Regional Criminalistics Laboratory.

[Filed Feb. 24, 1998]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-8-P

REMON LEE,
Petitioner,

vs.

MIKE KEMNA,
Respondent.

ORDER GRANTING PETITIONER'S MOTION
TO INCLUDE DOCUMENTS

It is ORDERED that petitioner's motion to include documents (Doc. No. 6) is granted insofar that the documents petitioner has attached thereto are filed as petitioner's exhibits in this proceeding.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
United States District Judge

Kansas City, Missouri,
Dated: FEB 24 1998

[Filed Mar. 11, 1998]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 98-0074-CV-W-8-P

REMON LEE,
Petitioner,

vs.

MIKE KEMNA,
Respondent.

RESPONSE TO ORDER TO SHOW CAUSE WHY
PETITIONER'S PETITION FOR WRIT OF HABEAS
CORPUS SHOULD NOT BE GRANTED

Comes now respondent, by and through counsel, and states as follows in response to this Court's order to show cause why a writ of habeas corpus should not be granted.

Statement of Custody and Parties

Named petitioner, Remon Lee, is currently incarcerated in the Crossroads Correctional Center, located at Cameron, Missouri, pursuant to the judgment and sentence of the Circuit Court of Jackson County, Missouri. Petitioner was convicted of first degree murder, § 565.020, RSMo 1994 and armed criminal action, § 571.015, RSMo 1994, and was sentenced to life imprisonment without the possibility of parole and ten years imprisonment with the terms of imprisonment to be served concurrently. Named respondent, Mike Kemna, Superintendent of the Crossroads Correctional Center, is petitioner's current custodian and thus is a proper party respondent. 28 U.S.C. § 2254, Rule 2(a).

Statement of Exhibits

1. Attached hereto is a true and correct copy of Volume 1 of the trial transcript; said volume is incorporated by reference herein, and identified as Respondent's Exhibit 1.

2. Attached hereto is a true and correct copy of Volume 2 of the trial transcript; said volume is incorporated by reference herein, and identified as Respondent's Exhibit 2.

3. Attached hereto is a true and correct copy of Volume 3 of the trial transcript; said volume is incorporated by reference herein, and identified as Respondent's Exhibit 3.

4. Attached hereto is a true and correct copy of the transcript of the new trial motion and sentencing hearing; said transcript is incorporated by reference herein, and identified as Respondent's Exhibit 4.

5. Attached hereto is a true and correct copy of the trial legal file; said trial legal file is incorporated by reference herein, and identified as Respondent's Exhibit 5.

6. Attached hereto is a true and correct copy of the post-conviction review legal file; said post-conviction review legal file is incorporated by reference herein, and identified as Respondent's Exhibit 6.

7. Attached hereto is a true and correct copy of the petitioner's consolidated appellate brief; said brief is incorporated by reference herein, and identified as Respondent's Exhibit 7.

8. Attached hereto is a true and correct copy of the state's appellate brief; said brief is incorporated by reference herein, and identified as Respondent's Exhibit 8.

9. Attached hereto is a true and correct copy of the order and memorandum of the Missouri Court of Appeals affirming petitioner's conviction and sentence and the denial of his post-conviction relief motion; said order and memorandum are incorporated by reference herein, and identified as Respondent's Exhibit 9.

Statement of Issues and Exhaustion

Petitioner raises the following grounds for relief:

1. Petitioner was forced against his will to accept as his appointed attorney an attorney not of his choosing.

2. The trial judge was biased against petitioner.

3. The prosecutor committed misconduct through tricking all petitioner's alibi witnesses into not testifying and by making improper closing argument.

4. The evidence was insufficient to support petitioner's conviction.

5. Petitioner's sentence is improper because he received more time than his accomplice.

6. The trial court violated petitioner's right to due process of law by not granting him a continuance to locate alibi witnesses who left the courthouse during trial without testifying.

7. The cumulative prejudice of all the errors alleged by petitioner rises to the level of a due process violation.

The only claims petitioner raised in his consolidated appeal were that the trial court erred in denying a continuance, that trial counsel was ineffective for not calling petitioner's accomplice Reginald Rhodes and that trial counsel was necessarily ineffective after petitioner's alibi witnesses left without testifying because no counsel could be effective under those circumstances (Resp.Exh. 7 at 7, 9).

All petitioner's grounds are exhausted either through presentation to the Missouri courts or procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 733 (1991).

Analysis

GROUND 1: Petitioner alleges he was forced against his will to accept an appointed attorney not of his own choosing and

this violated the United States Constitution since he wished to *retain* a different attorney.

This claim is not in petitioner's new trial motion (Resp.Exh. 5, 47-52). It is not in either the *pro se* or amended post-conviction relief motions [1] (Resp.Exh. 6, 1-10, 20-29). The claim was thus defaulted. The claim was again defaulted when it was not raised in petitioner's consolidated appellate brief (Resp.Exh. 8). Petitioner's ground is procedurally barred from review. *See Reese v. Delo*, 94 F.3d 1177, 1185 (8th Cir. 1996), *cert. denied* 117 S.Ct. 2421 (1994).

Petitioner's ground is also meritless. Petitioner was represented at trial by Mr. James McMullin. Petitioner's previous attorney Mr. Robert Calibi had withdrawn from the case because he was unable to get along with petitioner (Resp.Exh. 3 at 495). Petitioner has no constitutional right to have an endless parade of lawyers appointed to represent him delaying the trial indefinitely. Additionally, at the end of trial the petitioner was questioned about the representation provided by Mr. McMullin (Resp.Exh. 4 at 8-19). Petitioner mentioned nothing about having money to retain a different attorney but nevertheless having McMullin forced on him. Rather, petitioner told the court concerning Mr. McMullin "I think he did a wonderful job" *(Id.* at 11). Also petitioner was represented on appeal by the public defender and apparently contemplated being so represented at the time of trial *(Id.* at 17, requesting the trial court provide the judgment as quickly as possible so it could be sent to the public defender to file a notice of appeal). In fact petitioner filed a motion stating he was indigent and requesting the appointment of the office of the public defender to represent him in the post-conviction

[1] If petitioner were using a trial error legal theory, the claim should have been in a new trial motion. If he were using an ineffective assistance of counsel theory, the claim should have been in a post-conviction relief motion.

process (Resp.Exh. 6 at 11). He was represented by the public defender in the post-conviction process and on appeal (Resp.Exh. 6 at Resp.Exh. 7). Petitioner's claim is thus inconsistent with the record of his case and meritless.[2]

GROUND 2: Petitioner alleges the trial judge was biased against him. This claim is not in petitioner's new trial motion or his consolidated appellate brief (Resp.Exh. 5 at 47-52; Resp.Exh. 6). The ground is procedurally barred from review. Missouri Supreme Court Rule 29.11; *Reese v. Delo*, 94 F.3d at 1185.

Petitioner's claim of judicial bias is based on three specific instances of conduct that are allegedly evidence of bias. The court questioned a state's witness after He was cross-examined by the defense and said "I bet you do" when defense counsel stated he had a few more questions (*See* Resp.Exh. 2 at 413-415).[3] The trial judge denied a continuance requested by petitioner after petitioner's alibi witnesses left the courthouse during trial. The trial court mistakenly believed petitioner's codefendant had gone to trial and been convicted when he had actually pled guilty. Were petitioner's ground not barred, it would necessarily fail as meritless. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (noting that allegations of personal bias or prejudice against a party have been held insufficient to raise a due

[2] Insofar as petitioner may be attempting to allege that trial counsel was ineffective for not calling Reginald Rhodes, the claim is meritless for the reason set out by the Missouri Court of Appeals (Resp.Exh. 9 at 6-8). As far as petitioner may be alleging counsel was ineffective for not calling alibi witnesses, the claim is also meritless for the reasons set out by the Missouri Court of Appeals (Resp.Exh. 9 at 8-9).

[3] The "I'll bet you do comment" itself was alleged to be trial error in the new trial motion but the claim was abandoned on appeal. Were petitioner trying to raise that trial error claim as an independent claim or trial error, his claim would be barred for that reason. However, petitioner appears to be raising the comment only as evidence of alleged bias.

process claim, and if a case exists that would implicate the due process clause, it would occur "only in the most extreme of cases"). Petitioner's claims do not show any bias at all and certainly his is not the "most extreme of cases."

GROUND 3: Petitioner alleges the prosecutor committed misconduct by tricking petitioner's alibi witnesses into leaving, rushing her case to a close, then commenting to the jury on the absence of the alibi witnesses. Petitioner's claim is procedurally barred from review since it was not presented in petitioner's motion for new trial or his consolidated appellate brief (Resp.Exh. 5 at 47-52; Resp.Exh. 7). *Reese v. Delo,* 94 F.3d at 1185. Petitioner also alleges the prosecutor committed reversible misconduct when after defense counsel told the jury it was the weakest case he had scene in his 40 years of experience, the prosecutor responded that defense counsel had said the same thing in the last case she tried against him. This claim is also procedurally barred since it was not raised in the motion for new trial or the consolidated appellate brief and it is also procedurally barred from review (Resp.Exh. 5 at 47-52; Resp.Exh. 7); *Reese v. Delo,* 94 F.3d at 1185

Petitioner's claims are also meritless. Petitioner alleges the prosecutor gave a witness list of 23 witnesses, indicated the state's case would take up the remainder of the day, "authorized" the excusal of the defense witnesses then cut her case short. This claim is not supported by the record.

The trial court recessed at 4:22 p.m. on February 23, 1994, the second day of trial (Resp.Exh. 2 at 441). Prior to the recess, counsel indicated they could not finish that day *(Id.* at 440). The court agreed to recess for the evening but indicated its hope that the case would conclude "very quickly in the morning so the jury can go to work" *(Id.* at 440).

The next morning, February 24th, the trial began at 9:13 a.m. (Resp.Exh. 3 at 442). The state rested after calling

two additional witnesses and the court recessed for ten minutes at the end of the state's case at 9:59 a.m. (Resp.Exh. 3 at 490).

The defense presented evidence until the noon recess at 12:05 p.m. (Resp.Exh. 4 at 571). Apparently after lunch defense counsel noticed petitioner's three alibi witnesses had left the courthouse. He put petitioner on the stand and petitioner testified he had seen them during a morning recess *(Id.* at 575). Counsel stated the witnesses had been subpoenaed for 9:00 a.m. on the 24th *(Id.* at 582). Defense counsel indicated that the alibi witnesses left around 11:00 a.m. and did not return *(Id.* at 576).

The trial record thus indicates that the potential witnesses left *after* the state's case had been completed and for whatever reason chose not to testify for petitioner. Nothing in the trial record indicates the prosecutor in any way told the witnesses they should leave or indicated that the state's case would take up the remainder of the third day of trial. This is in fact refuted by the record.

During the defense closing argument, defense counsel stated he had been trying cases for 43 years and never seen a case as weak as this *(Id.* at 618). During the state's rebuttal argument, the prosecutor pointed out that defense counsel had made the same argument in the last case she tried against defense counsel *(Id.* at 618-619). Defense counsel did not object but stated he did not remember that case *(Id.* at 620). Also without objection the prosecutor asked the jury "Where are those alibi witnesses Mr. McMullin promised you from opening? They're not here" *(Id.* at 624).

The prosecutor properly commented on a statement made by defense counsel implying that defense counsel had extrajudicial knowledge, and the prosecutor properly commented that promised evidence was not presented. It cannot be reasonably argued that the trial court violated

petitioner's constitutional rights by not *sua sponte* declaring a mistrial. Petitioner's claims are clearly meritless as well as barred.

GROUND 4: Petitioner alleges the evidence was insufficient to support his convictions for first degree murder and armed criminal action. This claim was not raised in petitioner's consolidated appeal and is therefore procedurally barred from review (Resp.Exh. 7; *Reese v. Delo*, 94 F.3d at 1185).

Petitioner's ground is also meritless. Petitioner was identified by an eyewitness as a participant in the shooting of Steven Shelby (Resp.Exh. 9 at 2-3). A reasonable jury could have convicted petitioner of first degree murder § 565.020, RSMo 1994 and armed criminal action § 571 .01 5, RSMo 1994. No constitutional violation occurred. *See Jackson v. Virginia*, 443 U.S. 307, 320 (1979).

GROUND 5: Petitioner alleges that his sentence was unconstitutionally disproportionate because his accomplice who was the actual shooter received a lesser sentence than he did. This claim was not in the motion for new trial or the consolidated appellate brief and is procedurally barred from review. *See* (Resp.Exh. 5 at 47-52; Resp.Exh. 7); *Reese v. Delo*, 94 F.3d at 1185. Further, petitioner's claim is legally meritless. *See Harmelin v. Michigan*, 501 U.S. 957 (1991) (questioning whether a term of years can ever be so disproportionate as to violate the Eighth Amendment and upholding a sentence of life without parole for cocaine possession).

GROUND 6: Petitioner alleges that the trial court violated his right to due process of law by not granting a continuance when his alibi witnesses disappeared from the courthouse. Petitioner also alleges that the *trial court erred in* not

allowing him to present the testimony of his accomplice Reginald Rhodes.[4]

Petitioner's claim concerning a continuance is procedurally barred. Although petitioner's point relied on perfunctorily mentions the United States Constitution (Resp.Exh. 7 at 11), petitioner's argument relied solely on the state law theory of abuse of discretion *(Id. at* 11-17). The Missouri Court of Appeals rejected the abuse of discretion for the independent claim and adequate state law reasons that the motion for continuance was not made in writing as required by law *and* the motion as presented did not meet the requirements which must be shown to gain a continuance due to the absence of a witness under Missouri Supreme Court Rule 24.10 (Resp.Exh. 9 at 4-5).

Petitioner's failure to argue a constitutional law theory in the argument portion of his brief defaulted that theory under Missouri law. *See State v. Isa*, 850 S.W.2d 876, 900-901 (*Mo. banc* 1993); *State v. Gott*, 784 S.W.2d 344, 346 (Mo.App., S.D. 1990); *State v. Franks*, 685 S.W.2d 845, 849 (Mo.App., E.D. 1984); *State v. Harris*, 670 S.W.2d 73, 81 (Mo.App., W.D. 1984). Because the Missouri Court of Appeals denied petitioner's claim based on the independent and adequate state law ground that the motion for continuance was defective, petitioner's federal constitutional claims are barred from review. *See Harris v. Reed*, 489 U.S. 285 (1989).

Petitioner's constitutional claim is also substantively meritless. The trial court had no constitutional obligation to delay petitioner's trial because petitioner's witnesses decided to absent themselves. *See United States v. Bonadonna*, 775 F.2d 949, 951-959 (8th Cir. 1985) (Trial court acted correctly in denying continuance when defendant changed lawyers two

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[4] On appeal petitioner alleged defense counsel was ineffective for not calling Rhodes, not that the trial court would not allow Rhodes to testify (*See* Resp.Exh. 7).

weeks prior to trial date and on the even of trial asked for a continuance so new counsel could become familiar with the case); *United States v. Ware*, 890 F.2d 1008, 1010 (8th Cir. 1989) (Trial court acted correctly in denying continuance when Petitioner decided to proceed *pro se* two days prior to trial); *Swindler v. Lockhart*, 885 F.2d 1342, 1350 (8th Cir. 1989) (Trial court appropriately denied continuance prior to penalty phase when no *justifiable reason* was provided for the requested delay). *See also Wise v. Bowersox*, slip op. No. 97-1139 at 11-14 (8th Cir. Feb. 20, 1998) (Trial court did not commit constitutional error by denying a continuance when *pro se* capital defendant requested counsel prior to penalty phase of trial and requested 24 hour continuance for counsel to prepare a penalty phase defense).

GROUND 7: Petitioner alleges that the cumulative effectiveness of all the errors he alleges rises to the level of a constitutional violation even if the individual claims do not. This claim was not raised in petitioner's motion for new trial or petitioner's consolidated appellate brief (Resp.Exh. 5 at 47-52; Resp.Exh. 7). The claim is procedurally barred. *Reese v. Delo*, 94 F.3d at 1185.

The claim is also meritless. *See Girtman v. Lockhart*, 942 F.2d 468, 475 (8th Cir. 1991) ("cumulative error does not call for habeas relief since each claim must stand or fall on its own").

WHEREFORE, for the reasons stated above, the respondent prays that this Court deny petitioner's petition with prejudice without further judicial proceedings.

Respectfully submitted,

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Attorney General

MICHAEL J. SPILLANE
/s/ Michael J. Spillane
Assistant Attorney General
Missouri Bar No. 40704

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(573) 751 -3321
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the foregoing document, has been mailed, postage prepaid, this 11th day of March, 1998, to:

Remon Lee
Register No. 167441
Crossroads Correctional Center
1115 East Pence Road
Cameron, Missouri 64429

/s/ Michael J. Spillane
MICHAEL J. SPILLANE
Assistant Attorney General

[Filed May 18, 1998]

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No: 98-0074-CV-W-8-P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

PETITIONER'S REPLY
TO RESPONDENT'S RESPONSE
TO COURTS ORDER TO ANSWER & SHOW CAUSE

COMES NOW, REMON LEE, Petitioner, Proper Person, and replys: that [Resp] has failed to obey the Courts order to answer [Pet] allegations in his habeas petition, & show adequate cause. Resp' merely tells this court that the grounds raised by Pet' are procedurally barred, either because of trial counsels failings or because Appellate counsel failed to raise or argue correctly on direct appeal.

PREMISE OF [PET'S] PETITION:

Petitioner submitted affidavits, and exhibits, to show actual innocence which overcomes/excuses procedural bar. [Pet] gave examples of judicial bias that denied his constitutional right to compulsory process right to put forth a defense. Establishing "an objective factor external to defense impeded counsels efforts."

Petitioner, alleged Ineffective assistance of Appellate Counsel, that Due Process Clause of the 14th Amend. guarantees a criminal defendant the right to effective assistance of Counsel on his First Appeal, as of Right. EVITTS V LUCEY, 105 Sct 830. That the courts have reversed & remanded, when they found an [accused] has been Actually or Constructively, denied counsel on appeal as of right, because prejudice is presumed. Petitioner alleged several instances, including but not limited to the grounds answered by [Resp].

Petitioner, asserted that had the errors not been made by [appellate] counsel, Pet', would likely have prevailed on appeal. That the total and cumulative effect of the errors rendered [pet] trial process in state court, fundamentally unfair. [Pet] contends that the Due Process Clause, guarantees a criminal defendant, the right to a fair and Impartial trial before a Impartial Trier of fact. Pet' gave example as raised on direct appeal [denial of continuance] see [Resp] ex #7 identified as [pet] consolidated appellate brief @13.

[trial judge]: "MY DAUGHTER IS GOING TO BE IN THE HOSPITAL ALL DAY. . . . So I've got to stay with her. . I'TS TOO BAD, THE COURT WILL NOT BE ABLE TO BE HERE TOMORROW TO TRY THE CASE." (Tr,580, 583)

Resp' does not answer or address this allegation, but merely tells this court cumulative error alleging denial of fair trial is not a question for federal review. knowing all the time that: [W]HETHER A CONVICTION FOR A CRIME SHOULD STAND, WHEN A STATE HAS FAILED TO ACCORD FEDERAL CONST. GUARANTEED RIGHTS: IS EVERY BIT AS MUCH A FEDERAL QUESTION AS WHAT PARTICULAR FEDERAL CONST. PROVISION THEMSELVES

MEAN. [W]hat the guarantee and [W]hether they have been denied. The formulation of the authoritative laws, rules and remedies designed to protect people from infractions by the states, of, federally guaranteed rights, . . . cannot be left to the states themselves.

GROUNDS RAISED ON DIRECT APPEAL:

I. The trial court abused its discretion in overruling appellants motion for continuance from the afternoon of February 24, 1994, until the next morning, after appellants subpoenaed alibi witnesses mysteriously disappeared from the courthouse before testifying, because the denial of the continuance violated appellants rights to due process of law and to present witnesses in his defense. As guaranteed by the 5th, 6th, 14th Amend. USC and by art.I, §§ 10 & 18(a) of the Missouri Const., in that the testimony of the missing alibi witnesses was vital, material, & relevant to appellants defense, the continuance requested by counsel was reasonable under the circumstances, & the trial courts reasons for denying the continuance had nothing to do with the case itself, BUT RATHER WITH THE COURTS PERSONAL SCHEDULE.

II. The motion court clearly erred in denying appellants rule 29.15 motion for Postconviction relief without granting an evidentiary hearing, because the record leaves the firm conviction that a mistake has been made, in that appellant has alleged facts, not conclusions, which if true would entitle him to relief, and which are not refuted by the record, in that appellant has alleged that trial counsel failed to exercise the customary skill and diligence a reasonably competent attorney would exercise under the same or similar circumstances, in violation of appellants rights to due process of law and to the effective assistance of cunsel, as guaranteed by the 6th & 14th

Amends. to the USC and by art.I, §§10 & 18(a) of Missouri Const, when trial counsel 1) failed to call appellants codefendant REGINALD RHODES to testify on appellants behalf that appellant was not involved in the shooting death of Steve Shelby, and . . .2) the trial court overruled defense counsels motion for continuance after appellants alibi witnesses mysteriously disappeared from the courthouse after SOME UNKNOWN PERSON TOLD THEM THEIR TESTIMONY WAS NOT NEEDED.

GROUNDS RAISED IN PCR 29.15, FIRST AMENDED MOTION:

1. Denied Due Process; a) Movants alibi witnesses, James Edwards, Gladys Edwards, and Laura Lee were told by an unknown person that they could leave the courthouse because they were not needed to testify. In fact, [they] were essential witnesses for movants defense, because movant expected them to testify and establish he was visiting his family, including parents, James and Gladys Edwards, in Ventura, Cali. during the entire month of August, 1992. The testimony of [these] witnesses was necessary for movants defense, since the state alleged movant was the get-away driver for Reginald Rhodes in the August 27, 1992, shooting death of Steven Shelby . . . his witnesses left under the mistaken impression that their testimony was not needed . . . Movant was denied his right to PRESENT EVIDENCE IN HIS DEFENSE, [] compulsory process, inter alia see [Resp] Ex #6, **21-22; b) denied right to fair trial, due process of law, to effective counsel when counsel failed to object to Courts BASIS FOR DENYING THE COTINUANCE, and clearly states [Resp Ex.6, **23-24] DENIED COMPULSORY PROCESS. c) trial counsel failed to adequately consult with movant about testifying on his own behalf at trial,

after witnesses left, see Resp Ex 6.; d) trial counsel James L. McMullin failed to object to the trial court submitting the charge of mur. in 1st degree to the jury under instruction 6, which did not require the jury to find deliberation in aiding or encouraging Reginald Rhodes to cause the death of Steve Shelby. inter alia. e) trial counsel failed to object and request mistrial when Steve Shelby sister, Rhonda testified she saw movant mear the scene of the shooting & in the presence of Reginald Rhodes the day before the shooing. Counsel had not investigated Rhona prior to trial. . . . , appeared to be suprised at Rhonda Shelby testimony, failed to request continuance to conduct investigation, [. . .] That Reginald Rhodes [codefendant] should have been called to testify at movants trial. Rhodes pleaded guilty to the offenses charged against movant, and had informed movant he would be willing to testify on movants behalf TO THE FACT THAT MOVANT HAD NO KNOWLEDGE . . . WAS NOT A . . . PARTICIPANT. A reasonable probability exists that the result of the trial would have been different had counsel called Rhodes to testify, since Rhodes may have provided a defense for Movant.....

2. Movant . . . does not waive any claim of which he does not have knowledge after the exercise of due diligence in investigating this case.

3. Movant hereby expressly request an evidentiary hearing on the claims raised.

GROUNDS IN PRO SE 29.15 MOTION:

a) failure to request alibi instruction;

b) failure to object to states jury instructions

GROUNDS RAISED IN MOTION FOR NEW TRIAL:

Defense attorney raised eight (8) grounds, see [Resp] Ex.5,-**47-52. These grounds included Insufficiency of evidence; denial of continuance; and denial of IMPARTIAL TRIER OF FACT, @ ¶4. see also ¶9, for preservation of COMPULSORY PROCESS ground raised in [Pet] habeas in this court.

MOTION FOR JUDGEMENT OF ACQUITTAL
AT THE CLOSE OF ALL THE EVIDENCE:

Defense attorney raised seven (7) grounds; including insufficiency of evidence; see [Resp] Ex. 5,-**45-46.

MOTION FOR JUDGMENT OF ACQUITTAL
AT THE CLOSE OF THE STATE'S EVIDENCE:

Defense attorney raised seven (7) grounds, including insufficiency of evidence; see [Resp] Ex.5-**43-44.

RESPONDENTS CONTENTION :

THAT the only grounds raised on consolidated appeal are: i) trial court erred in denying continuance [Compulsory Process]; and ii) trial counsel was ineffective for not calling codefendant Reginald Rhodes, and that trial counsel was necessarily ineffective after Pet's alibi witnesses left without testifying because no counsel could be effective under those circumstances. Resp' tells the court that for reasons given by the state that failing to call Reginald Rhodes was trial strategy is virtually unchallegeable and that it must be proved what the testimony would have been and that the witness was willing to testify. That for these reasons it was not err to deny this point on direct appeal.

Pet' asserts that it was not trial strategy and the record shows it was not, See Pet's Ex.-A.1 attached to habeas pet. [*14 TR.Trans], The attorney Mr. McMullin clearly

states HE HAD NO KNOWLEDGE [RECOLLECTION] that MR RHODES WAS GOING TO OR WILLING TO TESTIFY. With no recollection, it could not have been trial strategy. Pet' also refers the court to [Pet] Ex. 1, the affidavit of Mr. Rhodes clearing pet' of any involvement and stating he was willing to testify. Showing actual innocence, which overcomes the procedural bar. Further warranting review by this court. Because there is clearly a denial of Compulsory Process the right to put forth a defense, by presentation of witnesses, by the denial of continuance. It is clear that had a jury heard the testimony of Mr. Rhodes they would have found pet' not guilty because it would have surfaced who actually drove the car.

FOR CLARIFICATION PURPOSES:

petitioner, attaches to the appendix herein: Four (4) Investigative Report, CASE DOCUMENTS. CONSISTING OF 1 Pg ea. viz: interviews of witnesses,

a) the mother of the victim DOROTHY M. SHELBY; she tells the police it was Reginald J. Rhodes and TERRY T. BARRETT [AKA Tat-Tat] was the driver of the truck;

b) the brother of the victim ERIC E. SHELBY; he tells the police that the BARRETTS were looking for the victim, specifically Tat-Tat Barrett and Man-Man, for theft of some car wheels taken in a breakin;

c) TERRANCE COLLINS, who was approached by Barrett, told the police that Ta-Tat suspected the victim of ripping him off;

d) OTIS CLARK, A FRIEND of the victim, stated it was possible the victim got the rims from the Barretts house, that the victim was trying to sell for $1,750.00 one week prior to the shooting;

Pet's offers these exhibits to show that the state already knew who the driver of the car was and the family knew, further the state knows that when Mr. Rhodes pled guilty, they were given the knowledge that [pet] was not involved and Tat-Tat was the driver of the car. Pet's name was never mentioned as a suspect to this crime. Had the jury been informed of this by the testimony of Mr. Rhodes, coupled with the testimony of def' alibi witnesses. The jury would have been aware that Pet' is innocent of these charges.

This is why the states interference with the def' witnesses testimony amounts to external factors, that overcome the procedural bar. The Resp' tells this court that the reasons given by the state court that the witnesses abandoned the [pet] justify the denial of an evidentiary hearing and the denial of relief. Petitioner, refers the court to [Ex.'s 2,3,4] provided in the motion to include documents; These aff's of alibi witnesses, Laura Lee, Gladys Edwards, & Minister, James Edwards, all explain to the court that they traveled from California to testify; that an officer of the court told them to leave because their testimony would not be needed until the following day.

The importance of the Alibi witnesses is not refuted by the record below. The record shows that trial counsel should have made his communication clear with the ALIBI WITNESSES, and ensured their presence and when the denied the continuance to secure their testimony after he had promised the jury they would testify & what they would testify to, the state & trial court knew they had given statements. The trial court should not have DENIED THE COMPULSORY PROCESS RIGHT.

Petitioner stands by his assertions in his habeas petition and states that the actual innocence provided & shown in

the affidavits submitted, and his claim that appellate counsel was ineffective for not raising the grounds raised in the habeas petition along with the external factors interfering with the defense function are enough to overcome the procedural bar. Fundamental fairness was not afforded to [Pet] by the judges merely saying that his daughter was to be in the hospital and this was the reason for denying the continuance.

Pet' further states that the appellate counsels abandonment of issues preserved in the motion for new trial constitutes constructive denial of appellate counsel. Just as Pet' was able to secure the affidavits from the witness, the appellate & PCR attorneys could have done the same, to enable the judges to make an informed decision. This shows the record below was not adequately developed for review by subsequent judges. The portions of the record relied on by Respondent are ambiguous or contradictory, particularly those related to the denial of continuance as denial of Compulsory Process and whether Mr Rhodes the codefendant's testimony would have been favorable. The Resp' relys entirely on the ruling of the state courts and state rules and standards. Which in itself is error and no grounds to bar review by this court.

Whether a state procedural rule is adequate to bar federal review is an issue of federal law, to be decided by the federal Court. *Williams* v *Lockahart*, 873 F2d 1129, 1131-32 (8th Cir '89).

A federal habeas court may consider the merits of a pet's procedurally defaulted claims if the petitioner establishes both cause for and prejudice from his default. To establish cause, pet' must show that some external factor, . . . INTERFERENCE BY STATE OFFICIALS . . . ARE EXAMPLE OF SUCH FACTORS *Amadeo v*

Zant, 108 Sct 1771, 1776-77; Parkus v Delo, 33 F3d 933, 938 (8th Cir '94).

Pet' herein has established cause for his default because the reasons for the disappearance of his Alibi witnesses was not available to his PCR counsel or his Appellate Counsel and neither made an effort to secure the reasons. The courts are learning for the first time by the affidavits provided herein.

The Respondent's response is GENERIC and does not address the Federal Standards of review; but mere states procedural bar, failing to acknowledge that the lack of fundamental fairness in state court gave the prosecution an unfair advantage that resulted in the conviction of an innocent person.

It can clearly be determined that a jury would more likely than not find the Petitioner herein not guilty with the evidence & testimony presented here with the affidavits.

CONCLUSION:

Petitioner would ask the court to allow a hearing in this matter, in order to reach the merits of [Pet's] claims. To direct parties to submit witness lists including whether the witness will testify live or by way of deposition, a brief synopsis of each witnesses' testimony, and an explanation of why such evidence is not cumulative exhibit lists including a brief statement explaining the relevance of such exhibit and why it is not cumulative; briefs addressing the merits of [Pet's] const. claims; and any depositions of witnesses whose testimony will be presented in such fashion. Because Pet' presents a strong actual innocence claim.

The Resp' has relied on the record of a state court that failed to hold a full and fair hearing. Petitioner has alleged sufficient grounds for release, relevant facts are

in dispute as to why the alibi witnesses left the courthouse and to whether or not Mr. Rhodes would have testified, and the reason why the trial judge denied the continuance.

Petitioner would ask that he be remanded to state court for new trial, or evidentiary hearing, or his release be ordered or what ever this court feels is in the Best Interest of Justice.

Respectfully submitted,

/s/ Remon Lee
REMON LEE #167441
Crossroads Cor. Cntr.
1115 E. Pence Rd.
Cameron, Mo. 64429

Nkuba

CERTIFICATE OF SERVICE

NOTICE:

This document is subject to the federal rules of evidence 28 USC § 1746. I certify verify state that the statements in this document are true and correct, under the penalty of perjury.

Executed on: May 11, 1998

Signature: /s/ Remon Lee
REMON LEE

I Remon Lee, certify that a true copy of the foregoing was mailed postage prepaid to the Missouri Attorney General Office on: May 11, 1998 and the original to the Clerk of U.S. District Court, Western Dist. of Missouri, this 11th day of May 1998.

/s/ Remon Lee

REMON LEE

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT [CASE DOCUMENT]

Case # Supp. 92-123374

TITLE OF INVESTIGATION	SUBJECT OF REPORT
HOMICIDE:	Interview:
Shelby, Steven B/M, 9/10/70 3010 E. 61st St. 444-5450	Dorothy M. Shelby, B/F, 5/30/49 3010 E. 61st. 444-5450

REPORT BY:	ASSIGNMENT:	DATE:	PAGE 1
Det. R Hartman, 3097	Homicide Unit	08/27/92	OF 1 PAGES

/s/ Robert E. Hartman

On 8/27/92 at 1800 hours, Det. Hartman was contacted by Ms. Dorothy M. Shelby, the mother of the victim. Ms. Shelby stated she had just received a call from an unknown person that stated that Reginald J. Rhodes, B/M, 7/17/74, of 2321 E. 71st Terr. was the shooter of her son and Terry T. Barrett, B/M, 7/23/71 of 5320 Brooklyn was the driver of the red truck. Ms. Shelby also stated she had heard that Rhodes and Barrett hung around together and Barrett had a red pick-up.

It should be noted that the caller told Ms. Shelby that the shooter was Reginald Rhodes, who lived on 71st and 72nd St and hangs at 5619 Michigan, also that the driver of the truck was Terry Barrrett. The correct names and addresses were discovered in the KCPD computer.

Supervisor: /s/ [illegible]
ekf/shl
Form 107 P.D.(10-80)

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT [CASE DOCUMENT]

Case # Supp. 92-123374

TITLE OF INVESTIGATION	SUBJECT OF REPORT
HOMICIDE:	Interview:
Shelby, Steven B/M, 9/10/70 3010 E. 61st St.	Eric E. Shelby, B/M 3010 E. 61st. 444-5450

REPORT BY:	ASSIGNMENT:	DATE:	PAGE 1
Det. Dresselhaus,	Homicide Unit	08/27/92	OF 1 PAGES

/s/ Dressel Haus

On 8/27/92 at about 1615 hours, I interviewed the above listed subject in regards to the above captioned offense. He identified himself as the victim's brother. He was at 3812 E. 71st with a Walker Perryman, when another friend, Randy Palmer, 3705 Gregory, 363-8147, came by and told him his brother had been shot. Randy then drove him to the scene. He did not know how Randy had found out. The last time he had seen his brother was on Tuesday, 8/25/92, at his sister's, 6621 Askew. His brother was there with two of his best friends, David Haynes, B/M, 21, 2245 E. 68th, and Roderick Terrell Kemp, B/M, 21 years old, who lives near 74th and College. He talked to the victim on the phone Wednesday, 8/25/92, at about 1700 hours, and his brother wanted him to join him at a motel. He did not know what hotel his brother was staying in but his friend, Kemp, would know.

He went on to state that his brother had recently been told that the Barretts were looking for him. He believed that it was Monday, 8/24/92 when he had a three way phone conversation with the victim and their brother Mark who is in jail in Jefferson City. Mark told them that he had heard from a source, in jail with him, that a Tat-Tat Barrett and a Man-Man, were looking for who broke into Barrett's house. The

man in jail with the brother had a friend named Pee-wee, who was approached by Tat-Tat Barrett. Apparently Tat-Tat had been told that the victim and a cousin had broken into the house. Further, that possibly a set of car wheels had been taken. The brother Mark warned the victim to watch out. The break-in at the house was about three or four weeks ago. Shelby went on to state that he believed he knew who Pee-wee was. He believed Pee-wee was a Terrence Clark who lives near 55th and Olive, second house north, on the west side of Olive.

The car the victim was driving belonged to a Cushmire Muhammad who lives at 7108 Bales. He believed Cushmire gave the car to his brother yesterday, 8/26/92, just before Cushmire went to jail.

Supervisor: /s/ [illegible]
ekf/eee
Form 107 P.D.(10-80)

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT [CASE DOCUMENT]

Case # Supp. 92-123374

TITLE OF INVESTIGATION	SUBJECT OF REPORT
Homicide:	Interview of:
Shelby, Steven b/m, 9-10-70	Terrance Collins, b/m 11-16-73 3864 E. 59 Terrace, no phone Grandmother's (363-5630)

REPORT BY:	ASSIGNMENT:	DATE:	PAGE 1
Det. J. Dresselhaus,	Homicide Unit	9/2/92	OF 1 PAGES

/s/ Wessehaus

On 9-2-92, at about 0950 hours, Det. Wantland and I responded to the above subject's residence where he was contacted in regards to the above captioned offense. He admitted that his nickname was PeeWee and that his grandmother stays at 5502 Olive. He admitted to being a friend of the above listed victim because they had grown up in the same neighborhood together. He also admitted that he had been approached by the subject, Te-Te Barrett about the victim just prior to his death. He stated that he was not sure of the exact date but he believed that it was the Wednesday just before the offense, which would be 8-26-92, that he was approached by Te-Te. Barrett had apparently seen him riding in a car with another friend of his known as Eric Hudson. Barrett then approached him when Hudson was no longer in his company and asked him who Hudson was and if Hudson might be responsible for ripping him (Barrett) off. He stated that he told him that he was sure Hudson had nothing to do with ripping Barrett off. He stated that Barrett asked him if the victim was involved in ripping him (Te-Te) off and he told him that he did not know. He was left with the impression that Barrett suspected the victim of having ripped

him off. He also admitted that he had talked to a relative of his by the name of James Ron Clark at the penitentiary about being approached by Te-Te Barrett. He also admitted that the word on the street was that Te-Te Barrett had hired someone to kill the victim.

dca/itc

Supervisor: /s/ [illegible]
Form 107 P.D.(10-80)

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT [CASE DOCUMENT]

Case # Supp. 92-123374

TITLE OF INVESTIGATION	SUBJECT OF REPORT
HOMICIDE:	Interview of:
Steven S. Shelby B/M, 09-10-70 3010 East 61st Street	Otis Clark, B/M, 04-26-71 3519 East Gregory #444-6862

REPORT BY:	ASSIGNMENT:	DATE:	PAGE 1
Det. R. Hartman #3097	Homicide Unit	08-27-92	OF 1 PAGES

/s/ Robert E. Hartman

On 8-27-92, at 1550 hours, Detective Hartman notified Otis Clark, a friend of the above victim, of his death. Mr. Clark stated he had received a telephone call from an unknown friend that someone had been "slayed" in the blue Chevrolet that belongs to Cush. Mr. Clark stated he knew that Cush Meyer Mohamad, who live at 7108 Bales, owns the blue Chevrolet but Cush was in jail and the victim was taking care of his car for him. Mr. Clark stated he then went over and informed the victim's family that it might have been the victim who was shot. Mr. Clark stated he had last seen the victim in Cush's car at the Amoco Station on 63rd and Prospect at 1800 hours, on 8-26-92, at which time the victim's friend, David L. Haynes, B/M, 2245 East 68th Street, was driving the car. Mr. Clark stated the victim would have been with David Haynes or Roderick "Terrell" Kemp, B/M, 2-26-71, at 7429 College. Mr. Clark stated the victim's mother had received a call from David, who asked for the victim just prior to our arrival. Mr. Clark stated that while we were talking he was paged by Terrell Kemp, however, Mr. Clark then returned Terrell's car and Terrell stated he had not paged Mr. Clark. Mr. Clark was asked what he believed was the reason the victim was shot and Mr. Clark stated that it

was possibly because of four gold Daytona rims the victim was trying to sell for $ 1,750.00 one week earlier. Mr. Clark was asked if he knew anyone with a red and white pick-up and he said no. Mr. Clark was asked if he knew the Barrett's at 58th and Park and he stated he did but the victim was smarter than to do something to them. Mr. Clark was asked if he knew anything about the victim doing a burlgary at the Barrett's house. Mr. Clark stated he had not heard anything about it but it would be a possible location the victim would have gotten the rims. Mr. Clark stated a lot of people take those gold Daytona's from people at gunpoint.

It should be noted Cush has been found to be Cushmeer S. Anderson, B/M, 7-7-75, of 7108 Bales.

Supervisor: /s/ [illegible]
dec/ioc
Form 107 P.D.(10-80)-

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-C V-W-6P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

SUPPLEMENTAL RESPONSE TO PETITION FOR
HABEAS CORPUS
ADDRESSING THE PETITIONER'S AFFIDAVITS

Comes now respondent, by and through counsel and states as follows:

The petitioner has supplemented his petition with four affidavits. These affidavits all appear to be in support of his ground three an allegation that the prosecutor tricked the petitioner's alibi witnesses into leaving the courthouse.[1]

The petitioner's underlying claim is procedurally barred. No variation of the claim was presented in the new trial motion or the post-conviction relief motion or the consolidated appeal. Obviously the claim if it were true could have been discovered through due diligence in time to present the claim in the state courts. It was not presented, and in fact the delay in the presentation of the claim as well as creating a procedural bar makes the claim even more incredible.

[1] In his original response the respondent pointed out that as well as being procedurally barred, the scenario set out by the petitioner in the habeas petition is refuted by the facts in the record (Response at 6-8).

The petitioner cannot establish good cause for not raising this claim in state court. There is no plausible good explanation external to the defense why the claim was not presented on direct appeal as a misconduct claim or in a post-conviction motion as an ineffective assistance of trial counsel claim.

The affidavits themselves clearly do not lift the procedural bar under the newly discovered evidence of actual innocence gateway to review. *See Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996) (if factual bases for an affidavit existed in time to present claim on appeal and it could have been discovered through due diligence, the affidavit was not *newly discovered evidence* that could defeat a procedural bar). Petitioner is barred from a hearing in this Court to further develop his claim unless the factual predicate of the claim could not have been discovered through due diligence in a timely manner and the affidavits establish by clear and convincing evidence that no reasonable fact finder would have found him guilty but for constitutional error. § 28 U.S.C. 2254(e)(2).

The affidavits the petitioner has presented are relevant only to his ground 3. As a matter of law this ground is barred from review and the affidavits as a matters of law are insufficient to lift this bar or entitle the petitioner to a hearing for the development of further evidence. Therefore the affidavits can have no effect on the outcome of the habeas petition.

WHEREFORE, the respondent prays that the petition for habeas corpus be denied with prejudice without further judicial proceedings

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
/s/ Michael J. Spillane
Assistant Attorney General
Missouri Bar No. 40704

Post Office Box 899
Jefferson City, Mo 65102
(573) 751-3321
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and correct copy of the documents have been mailed, postage prepaid, this 25th day of March, 1999, to:

Remon Lee
Register No. 167441
Crossroads Correctional Center
1115 East Pence Road
Cameron, Missouri 64429

/s/ Michael J. Spillane
MICHAEL J. SPILLANE

[Filed Apr. 19, 1999]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-6-P

REMON LEE,
Petitioner,

vs.

MIKE KEMNA,
Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed this *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his 1994 conviction for first degree murder and the sentence of life imprisonment without parole pursuant thereto, which were entered in the Circuit Court of Jackson County, Missouri.[1] Petitioner raises seven (7) grounds for relief, all of which respondent contends are procedurally barred from federal habeas corpus review because petitioner did not present them in his consolidated direct appeal and appeal from denial of state post-conviction relief pursuant to Mo. Sup. Ct. R. 29.15. *See* Respondent's Exhibit 7; *State v. Lee*, 935 S.W.2d 689 (Mo. Ct. App. 1996) (per curiam). Respondent further contends that petitioner's claims are without merit.[2]

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[1] Although petitioner does not state that he challenges his conviction and concurrent ten-year sentence for armed criminal action, the Court notes its existence. *See* Respondent's Exhibit 9.

[2] Because the Court agrees that petitioner procedurally defaulted Grounds 1-5 and 7, a review of the merits of those claims is unnecessary and inappropriate.

Petitioner raised only two points in his consolidated appeal brief: (1) the trial court erred in overruling his motion for a continuance after his alibi witnesses disappeared from the courthouse before they were to testify; and (2) his trial counsel was ineffective for failing to call petitioner's co-defendant at trial and when the trial court overruled defense counsel's motion for a continuance after petitioner's alibi witnesses disappeared without testifying. Respondent's Exhibit 7, pp. 7-10.

Petitioner raises the following grounds for relief in this federal petition: (1) he was forced against his will to accept an appointed attorney not of his own choosing because he wanted to retain a different attorney when his previously retained attorney withdrew from the case; (2) the trial judge was biased against him based on three specific instances of conduct or comments; (3) the prosecutor committed misconduct by tricking petitioner's alibi witnesses into leaving the courthouse, rushing her case to a close, and commenting to the jury on the absence of the alibi witnesses; (4) the evidence was insufficient to support his convictions; (5) his sentence is constitutionally disproportionate to that of his co-defendant who actually shot the victim; (6) the trial court violated due process by failing to grant him a continuance when his alibi witnesses disappeared from the courthouse and in not allowing him to present his co-defendant's testimony; and (7) the cumulative effect of all the errors rises to the level of a constitutional violation.

Procedural Default—Grounds 1-5 and 7

A review of the record demonstrates that petitioner procedurally defaulted Ground 1 by failing to raise it in his pro se or amended Rule 29.15 motions or in his consolidated appeal brief. Respondent's Exhibits 6 and 8. Grounds 2, 3, 5, and 7 were procedurally defaulted by petitioner's failure to raise them in his motion for new trial or in his consolidated

appeal brief. Respondent's Exhibits 5 and 7. Ground 4 also was not raised in petitioner's consolidated appeal brief. Respondent's Exhibit 7.

In *Coleman v. Thompson*, *501* U.S. 722 (1991), the Supreme Court held:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. Cause, actual prejudice, and the probability of a "fundamental miscarriage of justice" are to be judged under criteria set out in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Murray v. Carrier*, 477 U.S. 478 (1986). *Coleman*, 501 U.S. at 748-50.

Petitioner contends that either trial counsel's or appellate counsel's ineffectiveness caused his state procedural default of Grounds 1-5 and 7 and that he is actually innocent of the crimes as evidenced by the affidavits of his mother, stepfather, and sister that he could not have committed the crimes in question because he was with them in California during August, 1992. Doc. Nos. 6 and 12. Petitioner also contends that an officer of the court caused his alibi witnesses to leave the courthouse before they were called to testify.

Petitioner cannot allege ineffective assistance of direct appeal counsel as cause for his state procedural default because he has failed to exhaust such a claim independently in the state courts as he must do before it can be used to establish cause under *Murray v. Carrier*, 477 U.S. at 489. *See Hall v. Delo*, 41 F.3d 1248, 1250 (8th Cir. 1994); *McKinnon*

v. Lockhart, 921 F.3d 830, 832 (8th Cir. 1990), *cert. denied*, 501 U.S. 1208 (1991).

Moreover, ineffectiveness of his Rule 29.15 trial or appellate counsel cannot constitute legally sufficient cause for his default because there is no constitutional right to effective assistance of counsel in state post-conviction proceedings. *Coleman v. Thompson*, 501 U.S. at 752; *Oxford v. Delo*, 59 F.3d 741, 748 (8th Cir. 1995), *cert. denied*, 517 U.S. 1124 (1996).

Petitioner also has failed to demonstrate that an officer of the court caused his alibi witnesses to leave without testifying. *See* Respondent's Exhibit 8, pp. 12-17. All of his three alibi witnesses were family members whose explanation for their disappearance at trial was available to petitioner or "discoverable through the exercise of due diligence" during the pendency of petitioner's direct appeal and/or state post-conviction proceedings. Thus, petitioner cannot meet the burden of 28 U.S.C. § 2254(e)(l) and (2) to show that the reason he did not develop the factual basis for his Grounds 3 and 6 in the state courts was because the claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or that they rely on "a factual predicate that could not have been previously discovered through the exercise of due diligence." Moreover, petitioner also has the burden of demonstrating that "the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

Petitioner has failed to meet the above standards regarding his failure to present the affidavits of his three proposed alibi witnesses to the state courts. Therefore, those affidavits cannot be considered in this federal habeas corpus proceeding. *See Weeks v. Bowersox*, 119 F.3d 1342, 1354

n.12 (8th Cir. 1997), *cert. denied*, __ U.S. __, 118 S.Ct. 887 (1998); *Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996).

Not only has petitioner failed to demonstrate cause for his state procedural default, he also has failed to show that he is "probably actually innocent" of the crimes for which he was convicted. *Bowman v. Gammon*, 85 F.3d 1339, 1346 (8th Cir. 1996), *cert denied*, __ U.S. __, 117 S.Ct. 1273 (1997). Therefore, further review of Grounds 1-5 and 7 is not required to prevent a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. at 495.

Trial Court Error in Denying Continuance and in Not Allowing the Testimony of Accomplice—Ground 6

In Ground 6, petitioner contends that the trial court violated his right to due process by not granting his motion for a continuance when his alibi witnesses disappeared from the courthouse and by not allowing him to present the testimony of his co-defendant. Respondent contends that petitioner's claim concerning a continuance is procedurally defaulted because petitioner only made a perfunctory citation to the United States Constitution in his Point I on appeal and relied solely on a state law theory of abuse of discretion in his argument. Respondent's Exhibit 7, pp. 7-8, 11-17. The Missouri Court of Appeals held that the motion for a continuance did not meet the requirements of Mo. Sup. Ct. R. 24.10 and that petitioner failed to demonstrate a reasonable probability of a different outcome if the witnesses had testified. Respondent's Exhibit 9, pp. 4-5. Respondent also contends that petitioner's claim regarding the co-defendant was raised as a claim of ineffective assistance of defense counsel for not calling the co-defendant, not as a claim that the trial court would not allow the co-defendant to testify. Respondent's Exhibit 7, p.9.

Although petitioner specifically cited to the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution

in his brief on appeal and argued that the denial of the continuance violated due process, Respondent's Exhibit 7, p.7, the Court concludes that petitioner's due process claim in Ground 6 was not "fairly presented" concerning the denial of a continuance because the state court's ruling was based on petitioner's failure to comply with Rule 24.10. *See Hall v. Delo*, 41 F.3d 1248, 1249-50 (8th Cir. 1994) (federal claim was not fairly presented to state courts when state court declined to decide federal claim on merits because petitioner violated a state procedural rule). The Missouri Court of Appeals rejected petitioner's claim because it was not made in writing and because it was not supported by the factual showing required by Rule 24.10.

As the Missouri Court of Appeals has noted, moreover, petitioner has failed to demonstrate that "the testimony of the absent witnesses [all family members] was so crucial that it is reasonably probable a different outcome would have resulted" even if he had established an abuse of discretion by the trial court in denying the continuance. Respondent's Exhibit 9, p.5. *See also* Respondent's Exhibit 8, pp. 15-17.[3]

Thus, Ground 6(a) is either procedurally defaulted or without merit, and Ground 6(b) is procedurally defaulted. Petitioner has failed to establish legally sufficient cause for his state procedural default and/or actual innocence for the reasons previously discussed regarding Grounds 1-5 and 7.

---

[3] Not only had eyewitnesses to the murder identified petitioner as the driver of the getaway truck, the victim's sister and her neighbor testified that petitioner came to their apartment complex on the night before the murder looking for the victim. Respondent's Exhibit 1, pp. 443-78. Thus, the state had produced overwhelming evidence that petitioner was in Jackson County on the day of the murder and on the previous night.

Accordingly, it is ORDERED that:

(1) the petition for writ of habeas corpus is denied;

(2) petitioner's motion for ruling (Doc. No. 14) is granted; and

(3) this case is dismissed with prejudice.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated: Apr. 19 1999

[Filed Apr. 19, 1999]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-6-P

REMON LEE,

Petitioner,

v.

MIKE KEMNA,

Respondent.

□ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ DECISION OF THE COURT. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: this petition for writ of habeas corpus is denied, and this case is dismissed with prejudice. (HFS)(dw)

Entered on: APR 19 1999

R.F. CONNOR
CLERK OF COURT

/s/ D.M. Weinzerl
D.M. WEINZERL
(By) Deputy Clerk

[Filed May 12, 1999]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DIVISION OF MISSOURI
WESTERN DIVISION

No. 98-0074-CV-W-6-P

REMON LEE, #167441

Petitioner,

vs.

MIKE KEMNA,

MOTION FOR RELIEF FROM JUDGMENT
RECONSIDERATION/REHEARING
OF HABEAS PETITION

NOW COMES Petitioner, in forma pauperis, and pursuant to 28 USCA § 2254, Title VI Habeas proceedings, and petitions for relief from District Courts Opinion of APRIL 19, 1999, denying [Pet's] original federal habeas corpus petition, And ask that the district court STAY [it's] order. Petitioner further states that, this motion be treated as a MOTION FOR RELIEF FROM JUDGMENT pursuant to Rule 60(b), 28 USCA, if a motion for reconsideration is deemed untimely filed. See: *Bedoya v. U.S.*, 11 F.Supp.2d 381 (6/24/98) citing: *U.S. v. Clark*, 984 F.2d 31, 32 (2nd Cir. 1993). In support of this motion, Petitioner states as follows:

1. This Court has misread the record, as submitted and accepted by the previous District Court Judge, when this court stated Petitioner submitted only three (3) affidavits, all from family members; in doing so has denied Petitioner the opportunity to show Actual Innocence, of the crime for which he was convicted.

2. This Court OVERLOOKED that Petitioner filed a MOTION TO INCLUDE DOCUMENTS which was accepted by the previous District Court Judge, consisting of, inter alia, four (4) Affidavits, listed as Exhibits 1-4. The affidavits the Court referred to in [it's] 4/19/99 opinion as from family members, are Exh.'s 2, 3, 4.

3. Petitioner's (Exh. 1), the Affidavit of REGINALD RHODES, was refered to in [Pet's] original habeas pleadings, in support of Petitioners' ACTUAL INNOCENCE. The Respondent made no reference to the affidavit of Mr. Rhodes and the Court in narrating the position of respondent, made no reference to the affidavit of REGINALD RHODES. This Court merely states: "Petitioner failed to show that he is "probably actually innocent" of the crimes for which he was convicted." citing: *Bowman v Gammon*, 85 F.3d 1339, 1346 (8th 1996). Petitioner ask this court to consider the decision in:

   United States ex rel. Gooch v McVica, 953 F.Supp. 1001, (1997), where the Court held: EXCLUDING CONFESSION OF PETITIONER'S COUSIN WAS UNREASONABLE, IN STATE MURDER PROSECUTION, DEPRIVED PETITIONER OF FAIR TRIAL.

4. An examination of the sentencing record shows; it was brought to the trial court's attention that someone was already convicted of this crime. However, the trial court stated [it] did not know someone had already confessed to, and pled guilty to this crime, for which Petitioner went to trial on.

5. It is more likely than not, that no reasonable juror would have convicted Petitioner, if the jury would have been told by the state, someone already confessed and pled guilty to this very charge that Petitioner stands trial,

before them on! The State intentionally withheld this exculpatory evidence from BOTH trial judge and trial jury, in violation of due process. The state had previously accepted the confession & guilty plea of Mr. Rhodes,

In the case of *United States ex rel. Gooch v McVica, Id.* relief was granted because it was found excluding the confession of Pet's cousin was unreasonable & deprived petitioner of fair trial. In the case at bench: the state excluded the confession of REGINALD RHODES, and like Gooch, the instant case was a murder trial and deprived petitioner of a fair trial.

The law is suppose to be EQUALLY APPLIED, the circumstances are the same, except Mr. Rhodes is *not* related to Petitioner in the instant case. The state accepted Mr. Rhodes plea prior to the trial of petitioner, so the knowledge cannot be denied by the state.

Petitioner is allowed to make a showing of actual innocence, and the court is not limited from reviewing the merits.

Petitioner's Exh. 1, the affidavit of Reginald Rhodes, that was OVERLOOKED by this Court; is attached to this Motion as Pet's (Exh. 1) and this affidavit clearly states:

(¶.3) "I REGINALD RHODES WAS IDENTIFIED AS THE SHOOTER [principal], BY AN EYEWITNESS. I PLED GUILTY TO THE SHOOTING DEATH OF MR. SHELBY, AS THE *LONE SHOOTER*. I WAS WILLING TO TESTIFY AT THE EVIDENTIARY HEARING AND THE TRIAL OF MR. REMON LEE, THAT: "HE WAS NOT PRESENT, NOR INVOLVED IN THE SHOOTING DEATH OF MR. STEVE

SHELBY. I WAS TOLD BY THE PROSECUTOR'S OFFICE THAT THEY WANTED REMON LEE, AND DID NOT CARE IF HE WAS INVOLVED OR NOT." "

Clearly, this affidavit supports 'actual innocence' and Mr. Rhodes confession should not have been kept from the jury. Then they could decide whether the other witnesses were mistaken. Also this may have clarified for the other witnesses, that Mr. Lee was not involved.

6. Relief from judgment is extraordinary judicial relief, and may be granted only upon showing of exceptional circumstances. RULE 60(b) establishes grounds on which this court in [it's] discretion may relieve a party from final judgment or order. I provides in relevant part:

> "ON MOTION & UPON SUCH TERMS AS ARE JUST, THE COURT MAY RELIEVE A PARTY . . . FROM A FINAL JUDGMENT, ORDER OR PROCEEDINGS FOR THE FOLLOWING REASONS: (1) mistake, surprise, indavertance, or excusable neglect; (6) any other reason justifying relief from the operation of the judgment, see: *Nemaizer v Baker*, 793 F.2d 58, 61 (1986)."

In the instant case, the court (opinion @ 3) states in denying relief that [Pet] claims ACTUAL INNOCENCE and relies on affidavits of his MOTHER, STEPFATHER, & SISTER. To reiterate these are Exh's 2,3,4, the court OVERLOOKED and made no reference to EXH. 1, the affidavit of REGINALD RHODES in support of actual innocence.

Petitioner ask this court to vacate [it's] April 19, 1999 ORDER, and address the merits of this actual innocence claim pertaining to the Affidavit of Reginal Rhodes, or, ORDER the respondent to address the merits pertaining to the

affidavit of Reginald Rhodes in support of the ACTUAL INNOCENT CLAIM.

ACCORDINGLY, Petitioner ask this motion be granted, and the merits, and actual innocence claim regarding the affidavit of Mr. Rhodes be addressed.

Respectfully submitted,

Remon Lee
Crossroads Cor. Cntr.#167441
Cameron, MO. 64429

CERTIFICATE OF SERVICE

I the undersigned, certify that the original of the foregoing was mailed to:

Clerk of U.S. District Court
811 Grand Ave.
K.C.Mo., 64106

and a copy to the Attorney General office, Jefferson City, Mo. on May 5th, 1999.

/s/ Remon Lee
REMON LEE

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-8-P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

AFFIDAVIT OF REGINALD RHODES

Reginald Rhodes, being truly sworn, states under oath as follows:

1. My name is Reginald Rhodes. I am over 21 years of age, and am fully competent to make this affidavit. The statements in this affidavit are true to the best of my personal knowledge.

2. At all times pertinent hereto, I was charged with the death of STEVE SHELBY: that occurred on or about August 27, 1992, and have personal knowledge to the events concerning the death of Mr. Shelby and the conviction of REMON LEE, [in question].

3. I Reginald Rhodes was identified as the shooter [principal], by an eyewitness. I pled guilty to the shooting death of Mr Shelby, as the *lone shooter*. I was willing to testify at the evidentiary hearing and the trial of Mr Remon Lee, that:

> He was not present, nor involved in the shooting death of Mr Steve Shelby. I was told by the prosecutors office that they wanted Remon Lee, and did not care if he was involved or not.

4. I was told by my attorney that Remon Lee had witnesses to prove his where-abouts on the day and time in question. However, Remon Lee wound up getting maliciously prosecuted for a crime he was *not involved in*. He even got more time than I [Reginal Rhodes got].

5. I wish to set the record straight, and testify that Remon Lee is innocent.

I, Reginald Rhodes, hereby certify that the above facts are true and correct, I have not been coerced in any way, and I am signing this under my own free will.

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

Subscribed and sworn to before me this 15 day of January, 1998.

/s/ Reginald Rhodes
REGINALD RHODES 500710
Jefferson City Correctional Center
P.O. Box 900
Jefferson City, Mo. 65102

/s/ Illegible
Notary Public
Dated: 1-15-98

[Filed May 14, 1999]

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF MIS:
WESTERN DIVISION

No. 98-0074-CV-W-8-P

REMON LEE, #167441

Petitioner,

vs.

MIKE KEMNA,

Respondent.

NOTICE TO CLERK OF COURT
REQUEST TO APPEAL JUDGMENT
OF DISTRICT COURT

Dear Clerk, I received the judgment entered on April 19, 1999, denying my petition for habeas corpus relief. I was told I have 30 days to file NOTICE OF APPEAL.

Pursuant to those instructions, I am notifying the court clerk of U.S. District Court, Western District of Missouri, & also, Michael Gans, United States Court of Appeals, 1114 Market St., St. Louis, Mo. 63101, that: I WISH TO APPEAL THE DECISION TO THE NEXT LEVEL, being 8th Circuit Court of Appeals.

I also would like the court to know that I filed with the District Court a MOTION FOR RELIEF FROM JUDGMENT pursuant to RULE 60(b)., mailed on May 5th, 1999.

Thank you,

Remon Lee #167441
Crossroads Cor. Ctr.
1115 E. Pence Rd.
Cameron, Mo. 64429

CERTIFICATE OF SERVICE

I the undersigned have mailed a copy of the foregoing to all parties on May 12, 1999.

Remon Lee.

[Filed May 19, 1999]

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 98-0074-CV-W-6-P

REMON LEE,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND DENYING PETITIONER LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL AND A CERTIFICATE OF APPEALABILITY

On April 19, 1999, this Court denied petitioner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and Judgment was entered pursuant thereto. On May 12, 1999, petitioner filed a motion for reconsideration of the Court's Opinion and Order entered on April 19, 1999, pursuant to Fed. R. Civ. P. 60(b). On May 14, 1999, petitioner filed a pleading entitled "Notice to Clerk of Court Request to Appeal Judgment of District Court." In his motion for reconsideration, petitioner contends that the Court misread the record because petitioner had submitted the affidavits of his co-defendant as well as three affidavits from his family members in support of his claim that he is actually innocent of the crimes for which he was convicted, but the Court made no reference in the April 19, 1999, Opinion and Order of the co-defendant's affidavit.

A review of the April 19, 1999, Opinion and Order reveals that, as argued by respondent, petitioner had raised his claim concerning his co-defendant's proposed testimony as an ineffective assistance of defense counsel claim for failing to

call the co-defendant in his Rule 29.15 motion, not as a trial court error as he does in his federal petition. In any event, this Court addressed petitioner's Ground 6(b) and concluded that Ground 6(b) was procedurally defaulted.

As to petitioner's affidavits of his family members, the Court concluded that they were not "newly discovered evidence" because they were discoverable at the time of petitioner's direct appeal and or state post-conviction proceedings. The transcript of the sentencing proceedings, Respondent's Exhibit 4, pp. 10, 13-16, demonstrates in a similar manner that the information contained in Reginald Rhodes' affidavit was available to petitioner in his state court proceedings. Petitioner's trial counsel stated at the sentencing hearing that he did not call petitioner's codefendant to testify at trial because the co-defendant would have had little credibility with the jury (especially because several eye-witnesses to the murder identified petitioner as the driver of the getaway truck). Respondent's Exhibit 4, P. 16.

Given the questionable veracity of Reginald Rhodes' affidavit, petitioner has not demonstrated that no reasonable juror would have convicted him in light of new reliable evidence of his actual innocence which was not presented at trial, *Schlup v. Delo*, 513 U.S. 298, 326-38 (1995), and which was not discoverable at the time of trial through due diligence. *See Meadows v. Delo*, 99 F.3d 280. 282-83; *Bowman v. Gammon*, 85 F.3d 1339, 1342 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 1273 (1997) (standard for gateway claims of actual innocence as to guilt phase issues).

As to petitioner's notice of appeal, under 28 U.S.C. § 1915, an appeal *in forma pauperis* may be permitted if an affidavit including a statement of all assets possessed and a certified copy of the inmate account statement for the preceding six months are submitted and if the appeal is taken in good faith. *See* Fed. R. App. P. 24(a). If the issues sought to be presented are plainly frivolous, the appeal is not taken in good faith.

Blackmun, *In Forma Pauperis Appeals*, 43 F.R.D. 343 (1967).

Further, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court unless a district judge or a circuit judge issues a certificate of appealability. Fed. R. App. P. 22(b). A certificate of appealability will be issued only if the applicant has made a substantial showing of the denial of a constitutional right and will indicate which specific issue or issues satisfy the showing required. 28 U.S.C. § 2253(c)(2) and (3).

Because petitioner has not stated any basis for overturning the April 19, 1999, Opinion and Order, in Doc. No. 19, this case presents issues which are not deserving of appellate review under the above standards.

Accordingly, it is ORDERED that:

(1) petitioner's motion for reconsideration pursuant to Fed. R. Civ. P. 60(b) (Doc. No. 18) is denied; and

(2) a certificate of appealability and leave to proceed *in forma pauperis* on appeal are denied.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated: May 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2406WMKC

REMON LEE,
Appellant,

vs.

MIKE KEMNA, *et al.*,
Appellee.

Appeal from the United States
District Court for the
Western District of Missouri

The appplication filed by Mr. Lee for a certificate of appealability in the above-referenced case has been considered by the Court and is hereby granted. A certificate is issued on the question of whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance.

September 30, 1999

Order Entered at Clerk, U.S. Court of Appeals,

/s/ Michael E. Gans
MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

[Filed May 25, 2000]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2406

REMON LEE,

Appellant,

vs.

MIKE KEMNA, Superintendent; JEREMIAH (JAY) NIXON, Attorney General, State of Missouri,

Appellees.

Appeal from the United States
District Court for the
Western District of Missouri.
[PUBLISHED]

Submitted: March 13, 2000
Filed: May 25, 2000

Before MORRIS SHEPPARD ARNOLD and FAGG, *Circuit Judges*, and BENNETT, *District Judge*[*]

PER CURIAM.

Remon Lee was tried in Missouri state court on charges of first degree murder and armed criminal action. During his trial, Lee's alibi witnesses failed to appear and Lee moved for a continuance until the witnesses could be brought to the courtroom. The continuance was denied and Lee was convicted and given a concurrent sentence of life without parole on the murder charge and ten years on the armed criminal action charge. The trial court denied Lee's motion for a new trial which alleged ineffective assistance of trial counsel and violation of his due process rights.

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[*] The Honorable Mark W. Bennett, Chief Judge, United States District Judge for the Northern District of Iowa, sitting by designation.

On direct appeal, Lee claimed his trial motion for a continuance and his post conviction motion for a new trial were improperly denied. The Missouri Court of Appeals found the continuance motion was properly denied because it did not comply with Missouri Supreme Court Rule 24.09, which sets out the required form of the motion, and Rule 24.10, which lists the required elements of the motion. The court also found the new trial motion was properly denied because Lee failed to produce evidence showing counsel was ineffective. Lee then filed a 28 U.S.C. § 2254 petition claiming the denial of his motion for a continuance violated due process. The district court denied Lee's habeas petition finding the claim procedurally defaulted. We granted a certificate of appealability on the question of whether denial of Lee's motion for a continuance was a due process violation.

Lee first argues he did not procedurally default his claim. We disagree. Federal habeas review is not available on Lee's due process claim if the Missouri Court of Appeals "rest[ed] [its decision] on a state law ground that is independent of the federal question and adequate to support the judgment," regardless of "whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *accord Hall v. Delo*, 41 F.3d 1248, 1249-50 (8th Cir. 1994). The Missouri Court of Appeals rejected Lee's claim because his motion for a continuance did not comply with Missouri Supreme Court Rules 24.09 and 24.10 and thus the claim was procedurally defaulted.

We reach the merits of Lee's procedurally defaulted claim only if he can show cause for his default and prejudice or actual innocence. *See Wyldes v. Hundley*, 69 F.3d 247, 253-54 (8th Cir. 1995). Lee claims his default should be excused because trial counsel's failure to follow Missouri's motion rules constituted ineffective assistance of counsel. We reject Lee's claim because ineffective assistance of counsel must be

presented to the state court as an independent claim before it can be used to establish cause for a procedural default. *See id.* at 253. Although Lee raised a claim of ineffective assistance in his postconviction motion for a new trial, he did not specifically allege failure of trial counsel to present properly the motion for a continuance. *See id.* (habeas petitioner must present to state court same specific claim of ineffective assistance made out in habeas petition). Thus, the Missouri courts had no opportunity to consider whether Lee's trial lawyer was ineffective for failing to present the motion properly and Lee cannot present that claim now. Because Lee has not shown cause for his default, we do not reach the issue of prejudice.

An actual innocence claim requires Lee to show "new reliable evidence . . . not presented at trial" establishing "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 254 (citations omitted). Lee has failed to make the required showing because the factual basis for the affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier. *See Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996). Even assuming the alibi testimony was new evidence, Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi.

We affirm the denial of Lee's habeas petition.

BENNETT, Chief District Judge, dissenting.

As Justice Fortas observed, "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 292 (1969). "Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'" *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72,

96-97 (1977) (Stevens, J., concurring)). With this view of the importance and purposes of a writ of *habeas corpus*, I am unwilling to condone what I believe was a conviction in Lee's case that violates "fundamental fairness." Furthermore, I do not believe that Lee's due process claim has been procedurally defaulted, as the majority concludes, even under the current status of federal *habeas* law, which, in my view, increasingly elevates tortuous and tangled procedural impediments over fundamental fairness. *See Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights" in *habeas corpus* actions). For these reasons, I must respectfully dissent.

To explain why I believe that the decision below must be reversed, I find that a more detailed discussion of the circumstances of this case is required. Lee was tried in Missouri state court on charges of first-degree murder and armed criminal action. At the opening of his trial, Lee's defense counsel promised the jury an alibi defense, complete with three alibi witnesses, who would establish that Lee was not in Kansas City, the location of the murder, on the day of the murder, but was instead in California. Indeed, the promised alibi witnesses—Lee's mother, stepfather, and sister—had voluntarily traveled from California to Missouri to testify on Lee's behalf at his trial and were present at the courthouse as trial began. Moreover, these witnesses were under subpoena and had previously met with defense counsel.

In its case in chief, the government presented the testimony of two witnesses who identified Lee as the getaway driver and two other witnesses who placed Lee in Kansas City within the twenty-four hours preceding the murder. However, the government presented no physical evidence linking Lee to the murder. On the Thursday morning before the state rested its case, Lee's alibi witnesses were present at the courthouse. However, following a lunch recess, the three witnesses could

not be located. Lee's alibi witnesses have since provided affidavits in which they aver that they left the courthouse only after being told by a court security officer that their testimony would not be needed until the following day, because the state's case would take up the remainder of the day. No judge of any stripe, state or federal, trial or appellate, has yet passed on the reason for the alibi witnesses' sudden disappearance from the courthouse just before Lee's defense was to begin.

Upon discovering that Lee's three alibi witnesses were not present in the courthouse after the lunch recess, Lee's counsel orally informed the court of that fact and requested that the court grant a continuance in order for him to attempt to secure the testimony of the witnesses. Trial counsel also informed the court that the witnesses were thought to be still in town, because Lee's mother and stepfather had plans to attend a religious activity in Kansas City that evening. The trial court announced that the trial could not be continued to the following day, Friday, because the judge intended to be at the hospital when his daughter had surgery. The trial court also informed the parties that the trial could not be continued to the following Monday, because the judge had another trial set to commence that day. The state trial judge concluded, without a scintilla of evidence or a shred of information as to why the alibi witnesses were absent, and without making any attempt to enforce the subpoenas for their attendance, that the alibi witnesses had "abandoned" Lee and his defense. As a result of the denial of Lee's oral motion for a continuance, no alibi defense was presented, and not surprisingly—indeed inevitably—Lee was convicted by the state court jury.

On direct appeal, the Missouri Court of Appeals affirmed the denial of Lee's motion for a continuance, concluding that the denial of the motion was proper, because Lee's counsel failed to comply with two Missouri Supreme Court Rules, Rules 24.09 and 24.10. Rule 24.09 requires that motions for continuances be in writing and supported by affidavits, unless the adverse party consents to an oral application. Rule 24.10

sets out the information that must be included in a motion for a continuance that is grounded on the absence of a witness. The state trial court, however, had not relied upon either of these rules in denying Lee's motion for a continuance, nor had the state resisted the motion on these grounds.

In this action for *habeas corpus* relief, Lee asserts that the denial of his motion for a continuance violated his federal right to due process. The federal district court to which Lee's petition for *habeas corpus* relief was presented concluded from the reliance by the state court of appeals upon its procedural rules that Lee's due process claim was procedurally defaulted. Specifically, the court below concluded that the decision of the Missouri Court of Appeals was based on an adequate and independent state law ground, which bars federal *habeas corpus* review. The majority agrees, and concludes further that Lee cannot overcome this impediment, because Lee is unable to demonstrate either "cause and prejudice" or "actual innocence."

A federal court's review of a *habeas* petition is barred when a state court dismisses or rejects a prisoner's claims on adequate and independent state law grounds, unless a petitioner can demonstrate either (1) cause and prejudice or (2) actual innocence. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). I concur with the majority's conclusions that Lee is unable to demonstrate "cause and prejudice" or "actual innocence." Lee cannot establish the necessary "cause," because he failed to raise before the state court his asserted "cause," which he alleges was his trial counsel's ineffective assistance in failing to follow Missouri's procedural rules for a continuance. *Wyldes v. Hundley*, 69 F.3d 247, 253 (1995), *cert. denied*, 517 U.S. 1172 (1996). I also agree that Lee cannot satisfy the demanding criteria of an "actual innocence" claim, because he has failed to offer new, reliable evidence of his innocence in light of which "it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Knox v. Iowa*, 131 F.3d

1278, 1282 (8th Cir. 1997). If Lee had been allowed a short continuance and had been able to present his alibi defense, he might very well have been acquitted, but he might also have been convicted. While the evidence against Lee was not strong, I recognize that a jury would have been free either to accept or reject his alibi defense. Therefore, I cannot find that Lee meets *Schlup's* high hurdle of "actual innocence"—even though he may in fact be innocent.

I nevertheless dissent, because I do not believe that we need to reach the question of whether Lee can overcome denial of his due process claim on adequate and independent state law grounds. Rather, I find that the decision of the Missouri Court of Appeals did not rest on any such adequate and independent state law ground. Therefore, I would hold that federal *habeas* review is *not* precluded in this case.

A panel of this court recently discussed the nature of, and limitations to, the bar to federal *habeas* review provided by denial of a claim on an "adequate and independent state law ground" as follows:

> Procedural default of a claim under state law may constitute an independent and adequate state ground, *Harris v. Reed*, 489 U.S. *255*, 262 (1989), but only if the state procedural rule is firmly established, regularly followed, and readily ascertainable. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). The underlying principle is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." *Easter v. Endell*, 37 F.3d 1343, 1347 (8th Cir. 1994). Or, as Justice Holmes expressed it, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24, 445. Ct. 13, 68 L. Ed. 143 (1923).

White v. Bowersox, 206 F.3d 776, 780 (8th Cir. 2000).

The "adequacy" of a state procedure presents a question of federal law. *Sloan v. Delo, 54* F.3d 1371, 1379 (8th Cir. 1995), *cert denied sub nom. Sloan v. Bowersox*, 516 U.S. 1056 (1996). A state law rule is not "adequate" to defeat federal *habeas* review if the rule is "unclear," "thwarts the assertion of federal rights," is "confusing," or is not "firmly established and regularly followed." *Id.* at 1379-80; *see also White*, 206 F.3d at 780 (to be "adequate" to bar federal *habeas* review, a rule must be "firmly established, regularly followed, and readily ascertainable"). A state law ground is not "independent" if it is in any way "linked to or dependent on any federal law." *Easter*, 37 F.3d at 1345. I have no trouble joining the majority's implicit conclusion that the state procedural rules at issue here, Missouri Supreme Court Rules 24.09 and 24.10, are not "linked to or dependent on any federal law," and thus constitute "independent" state law grounds for denial of Lee's motion for a continuance. However, I strenuously disagree that these rules present any "adequate" state law ground to bar federal *habeas* review of Lee's due process claim.

In some recent decisions, this court has found certain state procedural rules were not "adequate" to bar federal *habeas* claims. In *White*, this court concluded that the petitioner was denied a fair opportunity to seek relief in his case, because the procedural rule that barred his second amended petition for state post-conviction relief was neither firmly established nor readily ascertainable. *White*, 206 F.3d at 780. The court found that the Missouri Supreme Court had introduced for the first time in White's post-conviction proceedings two limitations on a recently-recognized remedy for attorney abandonment of a petitioner in post-conviction proceedings. *Id.* at 781. However, this court found that neither limitation could

reasonably have been anticipated in advance of its application in the petitioner's case. *Id.* at 781. Importantly, the court held that whether or not a limitation was "implicit in, and correctly derived from, Missouri's prior precedents," or "appear[ed] in retrospect to form part of a consistent pattern of procedures, it should not be applied as a procedural default if the defendant could not be deemed to have been apprised of its existence." *Id.* (citing *Ford,* 498 U.S. at 423). Therefore, "even if . . . th[e state] rule forms a consistent pattern with prior [state] precedents, we could not apply it as a procedural default in this [*habeas*] case."

Similarly, in *Easter,* this court concluded that Rule 37 of the Arkansas Rules of Criminal Procedure did not meet the due process requirement of "adequacy" to bar a federal *habeas* claim. *See Easter,* 37 F.3d at 1345-46. The rule in question reinstated state post-conviction relief proceedings and set deadlines for the filing of state actions for such relief *Id.* at 1344. In *Easter,* although this court concluded that Rule 37 otherwise provided constitutionally adequate procedures, it nevertheless was not adequate to bar federal *habeas* claims, because it was not a "firmly established rule when it was applied to Easter." *Id.* at 1346. This court reiterated that conclusion in *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995), holding,

> As in *Easter,* the state has not demonstrated that Pearson was put on notice that he had a Rule 37 remedy before his filing deadline passed. The availability of Rule 37 was not firmly established when Pearson needed to pursue it. Accordingly, Pearson's Rule 37 default is not adequate to support a denial of federal review of the merits of Pearson's constitutional claims.

Pearson, 52 F.3d at 742.

The state procedural rules that purportedly stand as bars to Lee's federal *habeas* due process claim are Missouri Supreme

Court Rules 24.09 and 24.10. Rule 24.09 requires that motions for continuances be in writing and supported by affidavits, unless the opposing party consents to an oral application. Missouri Supreme Court Rule 24.10 states that a motion for a continuance, written or oral, based on the absence of a witness must state specific matters, including the materiality of the evidence and diligence to obtain it, reasonable grounds for belief that the attendance of the witness can be obtained within a reasonable time, the facts the witness will prove and that no other person who could have been procured for trial can prove those facts or prove them so fully, the applicant's good faith, and that the witness is not absent by the connivance, consent, or procurement of the applicant. The Missouri Court of Appeals has explained that "the reason for this rule is obvious, it permits the trial court to pass on the merits of the request." *State v. Robinson*, 864 S.W.2d 347, 349 (Mo. Ct. App. 1993). However, to determine the "adequacy" of the bar to federal *habeas* claims raised by these rules, I must determine whether the application of these rules by Missouri appellate courts to the circumstances presented when Lee moved for a continuance based on the sudden absence of his alibi witnesses in the midst of his trial was firmly established, regularly followed, or readily ascertainable. *White*, 206 F.3d at 780.

I acknowledge that Missouri appellate courts have routinely held that "[f]ailure to comply with Rules 24.09 and 24.10 alone is sufficient to sustain the trial court's ruling" denying a continuance. *See, e.g., State v. Dodd,* 10 S.W.3d 546, 555 (Mo. Ct. App. 1999) (treating a motion for a continuance that was not accompanied by an affidavit as an oral motion to which the state had not consented); *accord Robinson,* 864 S.W.2d at 349 (stating failure to comply with Rule 24.09 was sufficient to deny a request for a continuance, citing *State v. Diamond,* 647 S.W.2d 806, 808 (Mo. Ct. App. 1982)); *State v. Lopez,* 836 S.W.2d 28, 32 (Mo. Ct. App. 1992) (citing non-compliance with either rule, and stating

"[d]efendant's failure to request the continuance by written motion accompanied by an affidavit is sufficient grounds to affirm the trial court's ruling"); *State v. Fuller*, 837 S.W.2d 304, 306 (Mo. Ct. App. 1992) ("The failure to comply with rules prescribing means for requesting a continuance is sufficient grounds to deny the request.") (citing cases); *State v. Anderson*, 785 S.W.2d 299, 302 (Mo. Ct. App. 1990) ("We agree that the defendant's failure to request the continuance by a written motion accompanied by an affidavit is sufficient ground for this court to affirm the trial court's ruling," thus relying on failure to meet the requirements of Rule 24.09, but finding "[m]ore important" was non-compliance with the requirement of Rule 24.10 that the personal presence of the witness could reasonably be obtained); *State v. Fletcher*, 758 S.W.2d 476, 478 (Mo. Ct. App. 1988) ("Defendant's failure to file the request in writing accompanied by an affidavit showing good cause as required by Rule 24.09 is sufficient ground to affirm the trial court's action.") (quoting *Diamond*, 647 S.W.2d at 808); *State v. Gasaway*, 720 S.W.2d 3, 5-6 (Mo. Ct. App. 1986) ("Where a defendant fails to comply with Rule 24.10, the trial court does not abuse its discretion in denying a continuance.").

I acknowledge further that Missouri appellate courts have routinely affirmed denials of oral motions for continuances that were prompted by the absence of a witness when the motions were made at or near the time of trial, or even during trial, on the ground that the motions did not comply with Rule 24.09 or Rule 24.10. *See State v. Wolfe*, 13 S.W.3d 248, 261 (Mo. 2000) (*en banc*) (affirming denial of an oral motion for continuance made in the course of trial after the trial court's denial of a motion to introduce an affidavit by the absent witness); *Dodd*, 10 S.W.3d at *555* (not indicating precisely when the oral motion for continuance was made, although it was apparently made in proximity to or during trial, and affirming denial of the motion); *Robinson*, 864 S.W.2d at 348 (affirming denial of a motion for continuance pursuant to

Rules 24.09 and 24.10 made at "docket call" three days before trial); *Lopez*, 836 S.W.2d at 31-32 (affirming denial of an oral motion for a continuance based on the absence of a witness apparently made on the second day of trial as an alternative to a request for late endorsement of another witness); *Fuller*, 837 S.W.2d at 306 (affirming denial of an oral motion for a continuance owing to the absence of a witness made on the day of trial); *State v. McCarter*, 820 S.W.2d 587, 588 (Mo. Ct. App. 1993) (affirming denial of an oral motion for a continuance owing to the absence of a witness made on the morning of trial); *Anderson*, 785 S.W.2d at 302 (affirming denial of an oral motion made on the day of trial); *Fletcher*, 758 S.W.2d at 478 (affirming denial of an oral motion for a continuance made "[a]fter the jury was seated"); *Gasaway*, 720 S.W.2d at 5 (affirming denial of an oral motion for a continuance made on the third day of trial); *Smith*, 633 S.W.2d at 416 (affirming denial of an oral motion for a continuance made "at the close of trial, before submission to the jury").

However, in *not one* of these cases was the absence of the witness sudden or unexpected. *Wolfe*, 13 S.W.3d at 261 ("Defense counsel told the judge that she had been trying to contact the [absent witness], but no one had seen her in weeks" and "[t]he State replied [to the motion for continuance] that it also could not find the [absent witness]."); *Dodd*, 10 S.W.3d at 555 (both the state and the defendant had attempted to subpoena the absent witnesses for prior proceedings and the defendant "conceded in his motion that he had not been able to locate the [absent witnesses] for several months before his trial"); *Robinson*, 864 S.W.2d at 348 (in premature reliance on a plea agreement that fell through, the defendant had not availed himself of the opportunity to depose the state's witnesses, even though the state had made those witnesses available); *Lopez*, 836 S.W.2d at 31-32 (nothing indicated the absence of the witness was a surprise); *Fuller*, 837 S.W.2d at 306 (the absent witness "had

been missing for more than a year, despite extensive efforts to locate her by both sides"); *McCarter*, 820 S.W.2d at 588-89 (in the oral motion, defendant alleged that the absent witness had not been located, had left town, and had no exact address at which he could be located, and counsel stated further that "[w]e are not sure if we can . . . find this man," and the court concluded that the motion was "insufficient on the matter well known before trial" and "the factual basis for the motion was not a last minute or unexpected surprise"); *Anderson*, 785 S.W.2d at 302 (it appeared that the absent witness "had fled the jurisdiction and that a 2-year effort to locate her had been unsuccessful"); *Gasaway*, 720 S.W.2d at 5 (although the oral motion for continuance was made on the third day of trial, the absent witness, who had appeared pursuant to a subpoena on the first day, had been absent the second day of trial, the trial court had issued a writ of body attachment, and the sheriff had made a "diligent" but unsuccessful effort to locate the witness); *Smith*, 633 S.W.2d at 416 (trial counsel had not shown "due diligence in securing the attendance of the witness, or his testimony by deposition for a year before trial," even though the testimony the absent witness was intended to impeach was known to counsel for about a year before trial). The situation was slightly different in *Fletcher*:

> Counsel stated that she was not aware of two of the potential alibi witnesses until a very short time ago. She was unaware of the third until the morning of the trial. The defendant stated he expected an alibi witness to appear but she had been subpoenaed to a child support hearing and could not appear.

Fletcher, 758 S.W.2d at 478. Nevertheless, the absence of the alibi witnesses in that case appeared to have more to do with lack of diligence than sudden and unexpected absence of a witness who had already presented himself or herself at the time of trial. *See id.*

Indeed, the reliance in all of these decisions on the defendant's prior knowledge of the unavailability of the witness, or circumstances that should have suggested to counsel that the witness would be unavailable at trial, implies that a truly unexpected absence of a witness, as occurred in this case, might excuse failure to comply or relax compliance with the written motion requirements of Rule 24.09 and the content requirements of Rule 24.10. *See, e.g., McCarter*, 820 S.W.2d at 589 (specifically noting that failure to comply with the requirements of Rule 24.09 was sufficient grounds to deny a motion for continuance, stating that this was "particularly true where the factual basis for the motion was not a last minute or unexpected surprise").

Thus, I do not find that the application of Rules 24.09 and 24.10 was "firmly established" or "regularly followed" in the circumstances in which Lee made his motion for continuance, that is, circumstances involving the sudden and unexplained absence of alibi witnesses who had been in attendance just prior to a recess after which their testimony was required and who were under subpoena to appear at that time. *Cf. White*, 206 F.3d at 780 (the limitations on the newly-recognized claim of attorney abandonment were introduced only in the petitioner's case, and therefore were not "firmly established" at the time his claim was denied on the basis of those limitations); *Pearson*, 52 F.3d at 742 ("The availability of Rule 37 [of the Arkansas Rules of Criminal Procedure] was not firmly established when Pearson needed to pursue it."); *Easter*, 37 F.3d at 1346 (Rule 37 of the Arkansas Rules of Criminal Procedure otherwise provided constitutionally adequate procedures, but nevertheless was not adequate to bar federal *habeas* claims, because it was not a "firmly established rule when it was applied to Easter").

Moreover, the possibility that application of Rules 24.09 and 24.10 to the circumstances presented in Lee's case was somehow "implicit in, and correctly derived from, Missouri's

prior precedents," or "appear[ed] in retrospect to form part of a consistent pattern of procedures," is not sufficient to bar his federal *habeas* claims, because those rules "should not be applied as a procedural default if the defendant could not be deemed to have been apprised of" their applicability. *White*, 206 F.3d at 780 (citing *Ford*, 498 U.S. at 423). The circumstances in which Lee moved for a continuance make it particularly unlikely that he could be deemed to have been apprised of the applicability Rules 24.09 and 24.10. As a practical matter, it is simply unrealistic to suppose that, when confronted during trial with the sudden and unexplained absence of witnesses who have previously been in attendance, both voluntarily and under subpoena, counsel will be able to produce a written motion, supported by an affidavit, as required by Rule 24.09, detailing expressly the information required by Rule 24.10. Indeed, it appears that neither the trial judge, Lee's counsel, nor opposing counsel considered the applicability of these rules in the circumstances, although the Missouri Court of Appeals later relied upon them to affirm the trial court's denial of a continuance. Therefore, I would hold that applicability of these rules in Lee's circumstances was not only not "firmly established" or "regularly followed," it was not "readily ascertainable." *Id.*

There are yet more grounds on which I would hold that failure to comply with Rules 24.09 and 24.10 does not constitute an "adequate and independent state law ground" for denial of federal *habeas* review. I would also hold that application of these rules in Lee's circumstances stands as no bar, because the rules would "thwar[t] the assertion of federal rights" in the circumstances of this case. *Sloan v. Delo*, 54 F.3d 1371, 1379 (8th Cir. 1995), *cert denied sub nom. Sloan v. Bowersox*, 516 U.S. *1056* (1996). In *Henry v. Mississippi*, 379 U.S. 443 (1965), the United States Supreme Court held that a state procedural ground was "adequate" to preclude federal review of a constitutional claim only if it outweighed the strong federal interest in hearing federal claims. *Henry*,

379 U.S. at 447; *cf Sykes*, 433 U.S. at 88-90 (holding Florida's "contemporaneous objection rule" to be an adequate state ground based on the important state interests it serves). A review of case law reveals instances in which federal courts have found the state interest furthered by the rule in question was not adequate to bar federal *habeas* claims, because that state interest had already been fulfilled. *See Smart v. Scully*, 787 F.2d 816, 820 (2d Cir. 1986); *see also Gaston v. Gostello*, 74 F. Supp. 2d 262, 274 (E.D.N.Y. 1999) (holding that a state appellate court's application of the "contemporaneous objection rule" did not preclude *habeas* review); *United States ex re. Smith v. DiBella*, 314 F. Supp. 446, 447 (D. Conn. 1970) (holding that rigid adherence to a state procedural rule, which required an appellant to submit a motion to correct a trial court's findings within two weeks after the findings are filed, was "so lacking in fundamental fairness as to constitute 'a miscarriage of justice which should not be permitted to occur.'") (quoting *Christoffel v. United States*, 190 F.2d 585, 594 (D.C. Cir. 1950)).

This line of authorities is exemplified by the decision of the Second Circuit Court of Appeals in *Smart*, 787 F.2d 816. In *Smart*, a petitioner prosecuting his *habeas* action *pro se* sought federal review on the ground that his incompetence at the time he entered his guilty plea had rendered his guilty plea involuntary. *Id.* at 817. In response, the state asserted that the petitioner had procedurally defaulted, because he had not sworn to his allegations of fact, as required by state procedure. *Id.* at 818. The district court denied the petition on the ground that the failure to include sworn allegations constituted procedural default. *Id.*

The Second Circuit Court of Appeals, however, reached the merits of the petitioner's claim, finding that the state court's denial was not based on an "adequate and independent" state ground warranting federal refusal to consider the federal issues. *Id.* at 820. The appellate court reasoned

that the state interest in having petitioners swear to their allegations of fact was not sufficient to preclude federal consideration of the petitioner's *habeas* claim, because the petitioner's pleading, "while not in compliance with state procedure, notified the court as to his constitutional claim and gave the state court a clear opportunity to address his claim or allow him to replead." *Id.* The court reasoned further that "Smart's type of error does not at all implicate the concerns expressed in [*Wainwright v. Sykes*, 433 U.S. 72 (1977)]," which related to improper diminution of "the significance of the state proceeding as the appropriate forum for the adjudication of all claims in a state criminal prosecution" to obtain some "strategic advantage." *Id.* at 820-21. Instead, the court could "perceive of no tactical benefit to be derived from Smart's failure," where "[h]is noncompliance with a threshold requirement of post-conviction relief caused him to suffer dismissal of his motion without providing any opportunity for a favorable outcome." *Id.* at 821. Thus, the appellate court in *Smart* found that this was not a situation in which a defendant "could preserve an opportunity for success at the state level while embedding in the state record a basis for possible future habeas relief." *Id.* at 821.

Likewise, I can perceive of no situation under which Lee "could preserve an opportunity for success at the state level while embedding in the state record a basis for possible future habeas relief" *Id.* Here, Lee informed the court of all the information he had regarding his witnesses' surprising disappearance. Given the three witnesses' sudden, unexplained absence from the courthouse during the middle of a trial day, it is impossible to imagine that counsel could have done more to meet the requirements of Missouri Supreme Court Rules 24.09 and 24.10.

Furthermore, it is difficult to understand what part of Rule 24.10 was not satisfied, either by counsel's representations at the time he moved for a continuance or by the circumstances

otherwise known to the court; therefore, the trial court was notified of the grounds for the motion for a continuance and was given a clear opportunity to address its merits. *Cf. Smart*, 787 F.2d at 820 (the petitioner's pleadings, "while not in compliance with state procedure, notified the court as to his constitutional claim and gave the state court a clear opportunity to address his claim or allow him to replead," and thus non-compliance with the state procedure was not an "adequate and independent state ground" to bar *habeas* claims). The materiality of the testimony of alibi witnesses in Lee's case was obvious, when counsel had detailed in his opening statements that the alibi witnesses would testify that Lee was in California, not Kansas City, at the time of the murders, and the diligence of the applicant in attempting to obtain the presence of the witnesses was equally apparent, because the witnesses had previously been present and were under subpoena. *See* MO. SUP. CT. R. 24.10(a). Counsel's representation that he believed the witnesses were still in town, because they intended to attend a religious service, in my opinion, established reasonable grounds for belief that the attendance of the witnesses could be procured within a reasonable time. *See* MO. SUP. CT. R. 24.10(b). Counsel's indication in his opening statement of the critical content of the alibi witnesses' testimony adequately indicated what facts the witnesses would prove, and it should have been obvious that no other testimony could adequately establish Lee's alibi defense. *See* MO. SUP. CT. R. 24.10(c). Counsel's representations that the witnesses had been present at the courthouse before the lunch recess and that he had no idea why they had not returned was sufficient, in my view, under the circumstances, to satisfy the requirements of the rule that the witnesses not be absent by connivance, consent, or procurement of the applicant, and that Lee was seeking a continuance in good faith and not simply for purposes of delay. *See* MO. SUP. CT. R. 24.10(d).

However, after quoting the provisions of the rule, the Missouri Court of Appeals stated only, "After a careful review of the record, we find appellant's motion was made without the factual showing required by Rule 24.10," and that denial of a motion based on a deficient application was not an abuse of discretion." *State v. Lee*, No. WD 49456, slip op. at 5 (Memorandum Supplementing Order Affirming Judgment Pursuant To Rule 84.16(b) and 30.25(b)). Thus, the court that relied on Rule 24.10 failed to specify in what respect Lee's motion for a continuance owing to the sudden absence of alibi witnesses was deficient. Furthermore, as I believe any seasoned trial lawyer would agree, requiring that a motion for a continuance be in writing, with supporting affidavits, as required by Rule 24.09, when the motion is made in the midst of trial upon the discovery that subpoenaed witnesses are suddenly absent, would be so bizarre as to inject an Alice-in-Wonderland quality into the proceedings.

It must be remembered that these three witnesses had voluntarily traveled from California to Missouri for Lee's trial and had been present, and apparently ready and willing to testify on Lee's behalf, that very morning. Moreover, Lee's witnesses' affidavits raise a serious factual issue, which no court has addressed, as to whether state action was responsible for the disappearance of the witnesses from the courthouse in the middle of the day on which their testimony was required. The trial court, however, did not even attempt to enforce the subpoenas for these witnesses or otherwise attempt to ascertain why they were suddenly absent. *Cf. Gasaway*, 720 S.W.2d at 5 (the oral motion for continuance was not denied until the day after the absence of the witness under subpoena was discovered, the trial court had issued a writ of body attachment, and the sheriff had made a "diligent" but unsuccessful effort to locate the witness).

In short, this is not a case in which Lee was "sandbagging" the state trial court in a strategic maneuver to forgo adjudication of issues in state court while embedding in the

record a ground for future federal habeas corpus relief. *See Smart*, 787 F.2d at 821 (considering whether the petitioner's non-compliance with state rules is simply an attempt to embed in the state record a basis for possible future habeas relief). Rather, Lee effectively placed the state court on notice as to the wounds for his motion for a continuance such that the state court had the opportunity to address the merits of his request. *Id.* at 820 (mere non-compliance with state rules should not preclude federal review, where the petitioner's defective motion nevertheless gave the state court a clear opportunity to address his contentions). I conclude that, under these unique circumstances, Lee's failure to comply fully with Missouri Supreme Court Rules 24.09 and 24.10 is insufficient to preclude federal consideration of Lee's habeas claim. *See id.* at 820-21. Rather, strict compliance with these rules would "thwar[t] the assertion of federal rights" in the circumstances of this case. *Sloan*, 54 F.3d at 1379.

To put it another way, applying these rules in the circumstances of Lee's case is not "fundamentally fair." *Engle*, 456 U.S. at 1 26; *accord Strickland* v. *Washington*, 466 U.S. 668, 697 (1984) (observing that "fundamental fairness is the central concern of the writ of habeas corpus"); *Sykes*, 433 U.S. at 96-97 (Stevens, J., concurring) (measuring the appropriateness of *habeas corpus* relief against a "fundamental fairness" standard). It is instead rampant elevation of procedure over substance. *Cf. Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting) (decrying the elevation of procedural impediments to vindication of federal rights in *habeas corpus* actions). We must not lose sight of the underlying principle behind the bar raised by an "adequate and independent state law ground," which is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." *White*, 206 F.3d at 780 (quoting *Easter*, 37 F.3d at 1347). The procedural rules raised as a bar here provided Lee with no

such fair opportunity, in the circumstances of his case, to obtain a continuance and mount his alibi defense.

This case, in no small measure, reflects the current status of federal *habeas corpus* jurisprudence. Judicial interpretation of the Great Writ during the past three decades has spun a cascading web of confounding and labyrinthine procedural obstacles, *see Coleman*, 501 U.S. at 759 (Blackmun, J., dissenting); *Murray v. Carrier*, 477 U.S. 478, 497 (1986) (Stevens, J., concurring in the judgment) ("The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in a procedural maze of enormous complexity."), notwithstanding that the Supreme Court once recognized that "habeas corpus is not 'a static, narrow, formalistic remedy . . ., but one which must retain the 'ability to cut through barriers of form and procedural mazes.' " *Hensley v. Municipal Court, San Jose Milpitas Jud. Dist., Santa Clara County, Cal*, 411 U.S. 345, 349-350 (1973) (quoting Jones *v. Cunningham*, 371 U.S. 236, 243 (1963), and *Harris v. Nelson*, 394 U.S. 286, 291(1969)). This large and increasingly complex web has now virtually obscured the core purpose of the Writ.

Not only has this procedural web taken on a life of its own, it has developed its own unique nomenclature, a procedural cant further obscuring the merits of most *habeas corpus* actions: Rather than addressing the underlying merits of the constitutional claims asserted by a petitioner for *habeas corpus* relief, opinions in *habeas* actions are now riddled (in both the primary and secondary sense of the word) with terms like "procedural default," "cause and prejudice," "abuse of the writ," "successive petitions," "mixed petitions," "adequate and independent state law grounds," "the 'look through' presumption," "the total exhaustion rule," "state waiver of the exhaustion defense," "non-retroactivity," "non-cognizable constitutional claims," "fairly presented claims,"

"unintended claims," "objective factors external to the defense," and "the presumption of correctness." The vast majority of federal *habeas* petitioners find themselves entangled in this omnipresent and perplexing procedural web, which effectively precludes federal courts from ever reaching the merits of their constitutional claims. For example, when the Third Circuit Court of Appeals recognized that a case before it "illustrate[d] the complexity engendered by the current federal habeas corpus doctrine of procedural default," *Hull v. Feeman*, 991 F.2d 86, 88 (3d Cir. 1993), the court also expressed its concern that its method for breaking free of the procedural web, so that it could reach the merits of the petitioner's claim, might instead "have placed [the petitioner] into an enclosed loop from which he cannot escape." *Id.* at 94 n.6.

With the inevitable focus on this bewildering array of convoluted procedural obstacles, it is all too easy to look past some crucial, simple truths. First, the mystifying procedural web most often traps and snares all but the most sophisticated or just plain lucky petitioners, and Lee is neither. Second, there is a reasonable possibility that Lee is in fact innocent. The case against him, based primarily on shaky eye-witness testimony with no corroborating physical evidence, was not strong. Third, his state court conviction was virtually assured by the trial judge's denial of his oral motion for a short continuance, because he was thereby precluded from presenting his alibi defense. The prejudicial effect of the denial of his motion for a continuance is especially apparent in light of defense counsel's promise, in his opening statement, to present an alibi defense and witnesses. Fourth, the trial court's summary denial of a continuance—on grounds that appear to me to be unreasonable and completely arbitrary, and hence fundamentally unfair, in the circumstances presented and in the face of a justifiable request for a brief delay—most probably amounts to an unconstitutional denial of due process. *See, e.g., McMiller v. Lockhart*, 915

F.2d 368, 372 (8th Cir. 1990) (a *habeas* petitioner's due process claim founded on denial of a motion for continuance of his criminal trial was judged against "fundamental fairness" and "abuse of discretion" standards, in light of the circumstances of the case), *cert. denied*, 498 U.S. 1108 (1991); *White v. Lockhart*, 857 F.2d 1218, 1220 (8th Cir. 1988) (where the *habeas* petitioner asserted a due process violation in the trial court's refusal to continue his criminal trial, the court noted that "'[o]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of justifiable request for delay'" rises to the level of a constitutional violation," quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), and stating that, to prevail, the petitioner "must show that in denying his request for a continuance the district court acted in a manner 'so egregious that it was fundamentally unfair,'" quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)); *Loggins v. Frey*, 786 F.2d 364, 366-67 (8th Cir.) (where a *habeas* petitioner asserts a violation of due process based on denial of a continuance, "'[o]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay'". . . . may give rise to a violation of due process") (quoting *Morris*, 461 U.S. at 11-12, in turn quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)), *cert. denied*, 479 U.S. 842 (1986). Lastly, it is hard to conceive of a more arbitrary action of a trial judge that could inflict greater prejudice to a defendant in a criminal case than the actions of the trial judge in Lee's case.

In sum, I would reverse the decision of the district court. I would hold that there is no procedural default, because there is no "adequate and independent state law ground" barring federal *habeas* review. Consequently, I would remand this *habeas* action for an evidentiary hearing on Lee's claim that he was denied due process when the state trial court refused to grant him a continuance in order to permit him to secure the testimony of his three subpoenaed alibi witnesses. The

district court should have the first opportunity to decide the merits of Lee's federal constitutional claim.

A true copy.

Attest: Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Filed Sept. 5, 2000]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2406WMKC

REMON LEE,

Appellant,

v.

MIKE KEMNA, Superintendent;
JEREMIAH (JAY) NIXON, Attorney
General,State of Missouri,

Appellees.

Appeal from the United States District Court
for the Western District of Missouri
98-74-CV-W-8-P

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 25, 2000

A true copy.

Attest: Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-24O6WMKC

REMON LEE,

Appellant,

v.

MIKE KEMNA, *et al*.,

Appellees.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied. (5128-010199)

August 8, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

MAY 11, 2001

(6)

Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

No. 00-6933

IN THE

Supreme Court of the United States

REMON LEE,

Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The petition for certiorari was prepared without the benefit of counsel. Court-appointed counsel has slightly reworded the questions presented in the case, which are as follows:

1. Whether petitioner was denied his rights to a fair trial and due process of law under the Fourteenth Amendment to the United States Constitution when the state trial court refused to grant him an overnight continuance to locate his three subpoenaed alibi witnesses who unexpectedly, and for reasons not attributable to the defendant, did not return after a lunch break on the last day of trial.

2. Whether the district court should have conducted an evidentiary hearing to consider whether petitioner's alibi witnesses were told by a state officer that they could leave the courthouse because their testimony would not be needed until the following day.

3. Whether, under the circumstances presented here, petitioner's federal due process claim was procedurally defaulted for failure to comply with state procedural rules governing motions for continuances that were adequate to support the denial of relief, and, if so, whether he has shown "cause" and "prejudice" to excuse the default.

4. Whether, assuming his federal due process claim is procedurally defaulted and that he has failed to show "cause" and "prejudice," petitioner has made a sufficient showing of "actual innocence" under *Schlup v. Delo,* 513 U.S. 298 (1995), to require the district court to conduct a hearing to evaluate his evidence so as to prevent the fundamental miscarriage of justice that would arise from the conviction and incarceration of an innocent man.

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Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128 (1986) 40

United States Department of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996) 44, 45

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of Lee's petition for a writ of habeas corpus is reported at 213 F.3d 1037 (8th Cir. 2000), and is reproduced in the Joint Appendix ("J.A.") at 233. The district court's opinion dismissing the petition is not reported and is reproduced at J.A. 212. The district court's unreported order denying petitioner's motion for reconsideration and denying him a certificate of appealability is reproduced at J.A. 229.

The unreported order of the state trial court denying Lee's motion for state postconviction relief is reproduced at J.A. 67. The order of the Missouri Court of Appeals affirming, in a consolidated appeal, Lee's convictions and the denial of state postconviction relief, is reported at 935 S.W.2d 689 (Mo. Ct. App. 1996), and reproduced at J.A. 122. The memorandum opinion accompanying that order is unreported and reproduced at J.A. 123.

JURISDICTION

The court of appeals entered judgment in this case on May 25, 2000. Petitioner filed a petition for rehearing and petition for rehearing en banc, which was denied on August 8, 2000. The petition for a writ of certiorari was filed on November 3, 2000, and granted on February 26, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The case also involves 28 U.S.C. § 2254(e)(2) and Missouri Supreme Court Rules 24.09, 24.10, and 29.15 (1994), which are set out in the Appendix ("App."), 1a-8a, to this brief.

STATEMENT OF THE CASE

Petitioner Remon Lee was convicted of first-degree murder and armed criminal action after a three-day jury trial held on February 22-24, 1994, in the Circuit Court of Jackson County, Missouri. He was sentenced to concurrent terms of life imprisonment without parole on the murder charge and ten years of imprisonment on the armed criminal action. R. 8 (Legal File, at 34, 36, 41); J.A. 34, 42-43.[1]

The issue at trial was whether the two eyewitnesses correctly identified Lee as the driver of the get-away truck after the shooting that killed Steven Shelby. Lee's intended defense was that he was in California, staying with family, at the time of the shooting and thus, that he could not have committed the crime. He never had a chance to present that defense.

1. The State Court Trial

a. The key evidence put on by the state at trial was as follows: Two eyewitnesses, Reginald Williams and William Sanders, testified that in the afternoon of August 27, 1992, the two of them were trying to start a moped in a yard in Kansas City. Tr. 205-06, 384-85, 397. While they were occupied with the moped, an older model rusty red and white truck drove up the street, with the driver its only occupant. Tr. 207-09, 211-12, 386, 401. The truck pulled into a driveway, turned around, and then drove back down the street, passing Williams and Sanders again. Tr. 208-10, 212, 268-69, 386-88. Although the driver was not paying attention to them at first, he stared at Williams and Sanders for two to ten seconds the second time he drove by. Tr. 208, 212-13, 325-29, 386, 398-400.

The truck parked nearby and remained there, with the driver inside, for thirty minutes to an hour. Tr. 388, 400.

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[1] Documents included in the district court record will be cited by Record ("R.") number. All documents from the state court proceedings included in the federal record were filed by the state in R. 8. The trial transcript will be cited as "Tr." and the sentencing transcript as "S. Tr."

Eventually, a blue 1965 Chevy Nova, carrying a driver and one passenger, came around the corner. Tr. 215, 378, 389, 401. The Nova pulled up across from the truck, and the car's passenger, later determined to be Reginald Rhodes, jumped out, ran around the front of the Nova, fired six or seven shots into the driver's side of the Nova, and then jumped into the passenger side of the truck. Tr. 213-18, 390, 400-01. The truck then sped off. Tr. 220, 390. Steven Shelby, the driver of the Nova, died from gunshot wounds. Tr. 436-37. No gun was ever recovered. Tr. 380, 383.

According to Williams and law enforcement witnesses, Williams was shown a photospread later that day of the shooting and tentatively identified Remon Lee, whom he had never seen before, Tr. 232, 279, as resembling the driver of the truck, although he wanted to see a better photograph or the individual in person before he could be certain. Tr. 226-27; 355-56, 359-60, 362. Williams later identified Lee as the driver after viewing two videotaped lineups, Tr. 228-32, 365-66, 369-72, and identified Lee at trial. Tr. 208-09. Williams could not identify the shooter. Tr. 264, 356, 372-74.

On cross-examination, Williams stated that he could see the driver of the truck only from the shoulders up. Tr. 273. He described the driver as a black man with a mustache, who was wearing a black silk shirt and a shoulder-length "curl" hairstyle. Williams testified there was nothing unusual about the driver's eyebrows or other facial features and that the driver was not wearing glasses. Tr. 274-77.

Williams admitted on cross-examination that he had lied to people investigating the case because he did not wanted to be "bothered." Tr. 234-35. He acknowledged that in a taped interview, he had told Lee's first defense counsel, Robert Calbi, and defense investigator Freddie Macon that Reginald Rhodes was the driver of the truck. Tr. 283, 285-88. Williams claimed at trial, however, that he had told Calbi that Rhodes, rather than Lee was the driver, because he had misunderstood the question, Tr. 283, and because Williams "didn't want to be bothered with him." Tr. 287. Williams admitted that he had told Calbi that he

had not picked anyone out of a lineup and that he could not identify the shooter or the driver. Tr. 290-93. He also acknowledged that he had initially testified in a deposition that Sanders, not Williams, had actually given the statement recorded in the police report, and that he later testified in the deposition that he, Williams, had given the report after all to the police, but that he had simply agreed with whatever Sanders said "to back him up." Tr. 308-11.[2]

On the day of the shooting, the police showed William Sanders the same photospread shown to Reginald Williams. Tr. 356-57, 393, 411. Sanders, too, did not know Rhodes or Lee before the shooting. Tr. 394. He identified Rhodes as the shooter, but he could not identify Lee or anyone else as the driver of the truck. Tr. 357-59, 363-64. Sanders described the driver as a black man with a collar-length "curl," "real thick" eyebrows, and a mustache. Tr. 403, 405-07, 409. Unlike Williams, Sanders testified that the driver was wearing sunglasses. Tr. 404.

Sanders admitted that he had not previously identified the driver in either a photospread or video lineup, Tr. 393, 397, 411, 421, and the prosecutor did not expect Sanders to identify Lee in court. *See* Tr. 181 (prosecutor's opening statement that only Williams had been able to identify the driver). Then, during cross-examination, Sanders claimed that now he could identify the driver. Tr. 396. Upon questioning by the trial judge, Sanders, for the first time, identified Lee as the driver of the truck—in a trial that took place a year and a half after the shooting. Tr. 414.

Rhonda Shelby, the victim's sister, testified that she saw Lee and Rhodes together near a red truck behind her duplex in Kansas City, between 8:00 and 9:00 p.m. on August 26, 1992, the night before the shooting. Tr. 443-45, 455. Rhonda Shelby

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[2] Throughout his testimony, Williams repeatedly contradicted himself as to whether he had in fact given the police a written statement, marked as State's Exhibit 15, on the day of the murder. *See, e.g.*, Tr. 220-27, 265-68, 306-08, 310-11.

knew Lee and identified him at trial. Tr. 443-44, 453. She claimed that she saw Lee and Rhodes when she was in her car, pulling in to park in her garage. Tr. 455-56, 460, 467-68. She did not speak to Lee. Tr. 455, 461-62. Later that same night, Rhodes approached her, looking for her brother. Tr. 444-46.

Lynne Bryant, a good friend of both Steve and Rhonda Shelby, Tr. 475, also testified that she saw Lee and Rhodes outside her duplex, adjacent to Rhonda Shelby's, the evening before the shooting. Tr. 471-72. Bryant knew both of them and identified Lee in the courtroom. Tr. 471-72. That night, Rhodes had asked Bryant if she had seen Steve Shelby; she did not speak to Lee. Tr. 478-79. Bryant testified that she remembered Lee driving an old orange truck, Tr. 473, though she told the police that a man named Terry Barrett was known to own and drive a red and white older model pickup truck. Tr. 486-87; *see also* note 8, *infra*.

No corroborating physical evidence put Lee at the scene of the crime or linked him to Shelby's death. Tr. 378-82. The state offered no explanation or motive for why Lee might have been involved in killing the victim. The shooter, Rhodes, who had pleaded guilty to the murder before Lee's trial, J.A. 37-38, did not testify against Lee.

b. At just before 10:00 a.m. on Thursday, February 24, the state rested its case, and Lee began his case in chief. Tr. 489, 491. Defense counsel had described Lee's defense in detail in his opening statement. After pointing out the flaws with Williams' identification of Lee, defense counsel informed the jury and the court that there would be an alibi defense and that Lee's mother, Gladys Edwards; his stepfather, James Edwards; and his sister, Laura Lee, would testify that Lee was visiting them in Ventura, California in August 1992, and thus could not have committed the crime. Counsel explained that the three alibi witnesses would testify that Lee came to visit them in California in July 1992 to celebrate his birthday and that of Laura Lee's daughter Maria, and that his mother and stepfather drove to Los Angeles, met Lee at the airport, and brought him to his sister's house, where he stayed through the rest of July,

August, September, and most of October, until around Halloween. The family remembered that Lee did not leave until late October because they begged him to stay for the Halloween party they were throwing for his sister's children. Lee's stepfather brought him back to the airport. J.A. 12-13. Counsel had also mentioned the alibi defense to prospective jurors during voir dire. J.A. 10, 11-12.

After the state rested, Lee's prior defense counsel, Robert Calbi, and investigator, Freddie Macon, testified in Lee's case in chief that they had interviewed Williams on April 23, 1993. During that interview, Calbi gave Williams a photospread with Lee's photo included, but Williams could not identify Lee or anyone else as the driver. Tr. 513-14, 556-57. Williams later gave Calbi the tape-recorded statement that was discussed during Williams' cross-examination; the tape was played for the jury. Tr. 565. Following Calbi's testimony, the court adjourned for a lunch recess, after which Lee was planning to call his alibi witnesses. Tr. 570-71.

When they returned, just after 1:00 p.m., defense counsel put Lee on the stand, outside the presence of the jury, for the limited purpose of making a record regarding the disappearance of Lee's alibi witnesses and Lee's right to testify in his own defense. J.A. 15. Counsel elicited testimony that Lee's mother, stepfather, and sister had come voluntarily from California to testify for Lee. J.A. 16-17. Defense counsel had met with these witnesses on Monday, February 21, 1994, and had served each of them with a subpoena requiring their attendance on that last day of trial, Thursday, February 24, at 9:00 a.m. J.A. 16, 18, 20-21. The Kansas City Police had talked to the witnesses after they arrived in Kansas City. J.A. 16. Lee confirmed the name of the hotel where the witnesses had stayed and that they had just relocated to Lee's uncle's house. The witnesses had previously informed counsel that there was no telephone at the uncle's house. J.A. 17.

All three witnesses were at the courthouse at 8:30 a.m. that day, February 24, sitting in the witness room, Tr. 182-83; *see also* J.A. 171, until they left later that morning. J.A. 16-17.

Based on his conversations with people at the courthouse, counsel estimated that the witnesses had left at about 11:00 a.m. *Id.* The witnesses had not returned when the proceedings resumed after the lunch break. Neither Lee nor his counsel knew where they went or why they had left, and Lee's girlfriend was attempting to locate them. J.A. 17. Lee asked his counsel to request "a couple hours' continuance" to try to locate them. J.A. 18. Lee told the court that he knew the witnesses were still in town because his stepfather, a minister, had a religious event to attend in Kansas City that night and the next. *Id.* The prosecutor did not dispute any of the representations made in this exchange. Defense counsel then requested a brief continuance until 9:30 the following morning, Friday, and suggested "capiases" (arrest warrants) for the witnesses. Counsel provided an address for where the witnesses were staying. J.A. 18, 20.

The trial court denied the motion, stating: "Friday. And my daughter is going to be in the hospital all day. . . . So I've got to stay with her." J.A. 20. After confirming that counsel had indeed issued subpoenas to the family members, the court continued:

> Well, I'm going to have to deny the motion for continuance. It looks to me as though the folks were here and then in effect abandoned the defendant. And that, of course, we can't—we can't blame that on the State. The State had absolutely nothing to do with that. That's—it's too bad. The Court will not be able to be here tomorrow to try the case.

J.A. 22. Counsel then asked whether the case could be continued until the following Monday. *Id.* The trial judge rejected that request as well because he had another case set for trial beginning Monday morning. He insisted that the trial resume. *Id.*[3] During the argument on the motion, the

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[3] Defense counsel then asked a correctional officer standing in the courtroom to confirm, for the record, that he had seen the three witnesses

prosecutor did not object to the request for a continuance, and neither the trial court nor the prosecutor voiced any objection to the manner or form in which the motion was presented or to the proffer that had been made.

Lee decided not to testify because of his prior convictions. J.A. 18-19. The defense called no further witnesses and hence presented no evidence regarding Lee's alibi. J.A. 24-25. Defense counsel announced to the jury that he had subpoenaed the three family members, that they had come and gone, and that he did not know why they had left. *Id.* During his closing argument, defense counsel again apologized for the absence of the alibi witnesses. J.A. 26. In her closing argument, the prosecutor capitalized on the witnesses' disappearance, arguing: "Where are those alibi witnesses that Mr. McMullin promised you from opening. They're not here. No doubt Remon Lee was in town here on August 26th and August 27th." J.A. 27. The jury found Lee guilty of murder in the first degree and armed criminal action. J.A. 42-43; Tr. 626-27.

Lee's counsel subsequently filed a written motion for judgment of acquittal or, in the alternative, motion for a new trial. J.A. 28. He argued that the "failure of the court to grant the defendant a reasonable continuance to attempt to find the witnesses, or the court to issue a body attachment, is prejudicial error and denied the defendant a fair trial." J.A. 32. The court denied the motion during the sentencing hearing on April 19, 1994. S. Tr. 5. Lee appealed. R. 8 (Legal File, at 54). His direct appeal was held in abeyance pending resolution of Lee's state postconviction motion.

2. <u>State Postconviction Proceedings</u>

On November 21, 1994, Lee timely filed a pro se verified motion for postconviction relief in the Circuit Court of Jackson County, pursuant to Missouri Supreme Court Rule 29.15 (1994), J.A. 45-54, which was later amended by appointed

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in the witness room that morning, and the officer agreed that he had seen counsel speaking to the witnesses he described. J.A. 23-24.

postconviction counsel and again verified by Lee. J.A. 55-66. Lee alleged, *inter alia*, that he had been denied due process of law and the effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments when: (1) his alibi witnesses were "told by an unknown person that they could leave the courthouse because they were not needed to testify," J.A. 56, a person Lee surmised may have been employed by the prosecutor's office, J.A. 58; and (2) the trial court overruled Lee's motion for a continuance because of his personal schedule, without even considering that another judge might have been available to preside or that Lee might have been able to locate his witnesses that afternoon. *See* J.A. 56-59.[4] Lee provided the names of the three alibi witnesses and described what their testimony would have been. J.A. 56-57. He explained that "[a]s a result of [his witnesses] being told they were not needed to testify, [they] left the courthouse and were not present when Movant presented his evidence in chief." J.A. 57. Lee claimed that he was denied his rights to present evidence in his defense, to due process of law, and to the effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments, J.A. 56-58, and requested an evidentiary hearing. J.A. 54, 62.

In response, the state disputed that a state officer had told the alibi witnesses they could leave and contended that Lee's allegation did not "make sense" and was a "bare conclusion and . . . not a factual allegation that can even be proven to be true; therefore, it is not a proper post conviction claim." App. C, at 12a-13a.[5]

On August 21, 1995, the state court refused to hold an

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[4] Lee's claims of ineffective assistance of counsel are not before this Court.

[5] Because the state's response to Lee's Rule 29.15 motion was not included in the federal court record below, Lee has appended it in Appendix C to this brief. It is appropriate for this Court to take judicial notice of pleadings that are part of the public record. *Papasan v. Allain*, 478 U.S. 265, 298 (1986).

evidentiary hearing and denied relief on all grounds. The court treated Lee's allegation that a state official had told his witnesses they could leave as raising only a claim of ineffective assistance of counsel and accordingly denied it because Lee failed to show that counsel was responsible for the witnesses' departure. J.A. 69-70. The court did not address Lee's claim that the alleged state interference with his witnesses denied him due process of law and the right to a fair trial. The court also did not address Lee's due process claim based on the denial of the continuance because "[t]rial error is an issue properly raised on direct appeal." J.A. 70. Lee appealed. R. 8 (Postconviction Relief Legal File, at 48).

3. Consolidated Appeal to the Missouri Court of Appeals

Pursuant to Missouri Supreme Court Rule 29.15(l) (1994), Lee's direct appeal and his appeal from the denial of state postconviction relief were consolidated before the Missouri Court of Appeals.[6] In Argument I, the direct appeal portion of his brief, Lee contended that the trial court abused its discretion and violated Lee's state and federal rights to due process of law and to present witnesses in his defense, when it denied his motion for an overnight continuance. J.A. 86-87, 90-95. In Argument II, the postconviction portion of the brief, Lee argued, among several grounds for relief, that the motion court erred in denying his Rule 29.15 motion without granting an evidentiary hearing regarding both the trial court's denial of a continuance and Lee's claim that a state employee "told Appellant's alibi witnesses that they could leave the courthouse because their testimony was not needed." J.A. 100-01. Lee cross-referenced the due process argument that he had made in the direct appeal portion of the brief, J.A. 100, and asserted that he had been denied his rights to due process of law and the effective assistance of counsel. J.A. 96, 101.

In response to Lee's direct appeal, the state contended, for

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[6] In 1996, Missouri revised Rule 29.15 to eliminate the consolidated appeal procedure. *See* Mo. Sup. Ct. R. 29.15(g) (2001).

the first time, that Lee had failed to meet the requirements of Missouri Supreme Court Rule 24.10 regarding the proffer to be made when a continuance is requested because of the absence of witnesses. J.A. 107, 110, 112-13. The state also opposed the due process claim on the merits. J.A. 113-15. In response to Lee's postconviction appeal, the State maintained that Lee could not show that his trial counsel was responsible for the disappearance of the witnesses. The state answered the due process component of the claim by arguing that Lee was making an "impermissible attempt to raise the same claim he raised on direct appeal" and that the allegation that a state official told Lee's witnesses they could leave was "a self-serving conclusion unsupported by any evidence." J.A. 119-20.

On October 22, 1996, in a per curiam order and supplemental unpublished memorandum opinion, the Missouri Court of Appeals affirmed the convictions and the order denying the Rule 29.15 motion. J.A. 122-31. First, the appellate court rejected Lee's direct appeal challenging the trial court's denial of a continuance. The court cited Missouri Supreme Court Rule 24.09—a rule neither the state nor the trial court had mentioned—which requires that an application for a continuance be made in writing and accompanied by an affidavit, unless the adverse party consents to an oral motion. The appellate court explained:

> After a careful review of the transcript and legal file, we find that appellant's motion was oral, although we find no indication of the State's consent to this deviation, as is required by Rule 24.09. Thus, the trial court could have properly denied the motion for a failure to comply with Rule 24.09.

J.A. 126-27. The court continued: "Even assuming, *arguendo*, that the oral motion was sufficient, appellant's argument still fails. Whether the motion is written or oral, Rule 24.10 sets out the required elements for a continuance to be granted on the basis of an absent witness." J.A. 127. After quoting Rule 24.10, the court explained:

> [W]e find appellant's motion was made without the factual showing required by Rule 24.10. When a denial to grant a motion for continuance is based on a deficient application, it does not constitute an abuse of discretion. As appellant has the burden of establishing that the trial court abused its discretion in denying his motion for continuance, we find that the trial court did not abuse its discretion here.

J.A. 127-28 (citations omitted). Even if Lee had established that the denial of a continuance was an abuse of discretion, the Missouri Court of Appeals concluded, "he cannot show prejudice thereby, which is necessary to prevail on this point. In order to show prejudice, appellant has the burden of showing that the testimony of the absent witnesses was so crucial that it is reasonably probable a different outcome would have resulted." J.A. 128.

The Missouri Court of Appeals likewise affirmed the denial of postconviction relief and the motion court's refusal to conduct an evidentiary hearing regarding the disappearance of Lee's witnesses. The appellate court pointed out that Lee did not allege that ineffective assistance of counsel led to the witnesses' departure. The appellate court did not address the due process implications of Lee's claim that a state official told his witnesses that they could go. J.A. 131.

Lee filed in the Missouri Court of Appeals a request for rehearing or, in the alternative, a transfer of the case to the Missouri Supreme Court. He also applied directly to the Missouri Supreme Court for a transfer. These applications were denied.

4. <u>Federal Habeas Corpus Proceedings</u>

a. The District Court

On January 16, 1998, Lee filed a pro se petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Western District of Missouri. J.A. 132-62. Lee claimed that he was denied his rights to due

process and a fair trial when the trial court denied his motion for a continuance. J.A. 135, 136, 157; *see also* J.A. 144-45, 147-52 (elaborating on denial of continuance claim). Under the heading of "prosecutorial misconduct," Lee maintained that the prosecutor had instructed a court officer to inform his alibi witnesses that their testimony would not be needed until the following day. J.A. 137, 155-56. Lee also complained that the state courts improperly denied him an evidentiary hearing. J.A. 135.

In addition to his own affidavit averring that he was in California visiting his family at the time of Shelby's murder, J.A. 161-62, Lee submitted affidavits to the district court from his three alibi witnesses. J.A. 168-74. Gladys Edwards, James Edwards, and Laura Lee stated, in these affidavits, that Lee had been released from prison in 1992 and had promised to come visit the family in California by his birthday, which was in July, around the same time as the birthdays of two other family members. The family usually held a reunion to celebrate the various birthdays. Remon Lee kept his promise to visit in July 1992. His family picked him up from the airport; Lee stayed at his sister Laura Lee's home; and his stepfather drove him back to the airport in October 1992. The family claims that he did not leave until then because they begged him to stay through Halloween. J.A. 168, 171, 173. Each of these witnesses stated that they had traveled from California to Missouri to testify on Lee's behalf at trial and that an officer of the court informed them that their testimony would not be needed until the following day and that they were excused. J.A. 169, 171-72, 173-74. As Minister James Edwards put it: "We did not travel from California to abandon the boy, we came to testify." J.A. 174.

Lee also submitted the affidavit of Reginald Rhodes, who swore under oath that he had been willing to testify at Lee's trial and at any evidentiary hearing that: "[Lee] was not present, nor involved in the shooting death of Mr. Steve Shelby. I was told by the prosecutors office that they wanted Remon Lee, and did not care if he was involved or not." Rhodes

claimed that he was told by his attorney that "Remon Lee had witnesses to prove his where-abouts on the day and time in question. However, Remon Lee wound up getting maliciously prosecuted for a crime that he was not involved in." J.A. 166-67.[7]

The state responded that all of Lee's claims were procedurally defaulted and otherwise without merit. J.A. 182-89; *see also* J.A. 209-10. Lee argued in reply that if his claims were procedurally defaulted, then the state's interference with his witnesses' testimony was an "external factor" constituting "cause" to excuse the default and that he was prejudiced by the denial of his right to present a defense. J.A. 191, 198-200. Lee maintained that his affidavits and exhibits established his "actual innocence" of the crime, which would overcome any procedural bar. J.A. 191, 197, 200. He requested an evidentiary hearing. J.A. 201.[8]

On April 19, 1999, the district court denied the petition in its entirety and, without conducting an evidentiary hearing, dismissed the case with prejudice. J.A. 212-18. The court determined that Lee's due process claim based on the denial of the continuance was not "fairly presented" to the state courts because the motion was not made in writing and was not

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[7] Throughout the state and federal postconviction proceedings, Lee has complained about Rhodes's failure to testify on Lee's behalf at trial, attributing it either to ineffective assistance of counsel or trial error. While these claims are not before this Court, Rhodes's affidavit is relevant to Lee's contention that he is actually innocent of Shelby's murder, as discussed below in Part IV.

[8] In addition to the affidavits he had previously submitted, Lee also pointed to several police reports of witness interviews, which he appended, suggesting that Terry Barrett had been involved in Shelby's shooting because he suspected Shelby of breaking into his house and "ripping him off." J.A. 197-98, 202-08. One of these witnesses, the victim's mother, reported to the police that she had received a call from an unknown person stating that Rhodes was the shooter and Barrett the driver of the truck. J.A. 202. As Lynne Bryant testified at trial, Barrett was known to own and drive a red and white older model pickup truck. Tr. 486-87.

supported by the factual showing required by Rule 24.10. J.A. 217. The district court also held that Lee had failed to develop in state court the factual basis for his claim that an officer of the court caused his alibi witnesses to leave; accordingly, because Lee was unable to make the showing required under 28 U.S.C. § 2254(e)(2)(A) & (B), the district court determined that it could not consider his affidavits. J.A. 215. The court also concluded that Lee could not establish either "cause" for his procedural defaults or that he was actually innocent of the crime. J.A. 216, 217.

Lee filed a motion for relief from judgment or for reconsideration or rehearing, J.A. 220-26, which the district court denied. The court also denied Lee leave to proceed in forma pauperis on appeal and a certificate of appealability. J.A. 229-31.

b. The Court of Appeals

The Eighth Circuit appointed counsel and granted Lee a certificate of appealability on the question "whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance." J.A. 232.

In a per curiam opinion issued on May 25, 2000, the court affirmed the denial of relief, over a dissent. J.A. 233-35. The court held that Lee had procedurally defaulted his due process claim by failing to comply with Missouri Supreme Court Rules 24.09 and 24.10. J.A. 234. The court did not address the district court's ruling that Lee was not entitled to an evidentiary hearing regarding the reasons his alibi witnesses had left. Moreover, the court rejected Lee's claim of ineffective assistance of counsel as "cause" for the default, but did not consider whether the witnesses' unexpected departure in the middle of trial or the state's alleged interference with the witnesses also could constitute "cause" for Lee's failure to comply with the Missouri rules governing continuances. J.A. 234-35.

In addition, the Eighth Circuit rejected Lee's claim of actual innocence as an exception to the required showing of

"cause and prejudice." Relying on circuit law, the court stated that Lee could not make the requisite showing "because the factual basis for the affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier." J.A. 235 (citation omitted). Even assuming that the alibi testimony was new evidence, the court continued, "Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi." *Id.*

Chief Judge Mark W. Bennett for the Northern District of Iowa, sitting by designation, wrote a vigorous dissent. He agreed that if Lee's due process claim was procedurally defaulted, then he could not demonstrate "cause and prejudice" or "actual innocence." J.A. 238-39 (Bennett, J., dissenting). But Judge Bennett "strenuously disagree[d] that [Rules 24.09 and 24.10] present any 'adequate' state law ground to bar federal *habeas* review of Lee's due process claim." J.A. 240. Although the dissent acknowledged that Missouri appellate courts have routinely held that a failure to comply with Rules 24.09 and 24.10 is sufficient to sustain a trial court's denial of a continuance, even when the requests were prompted by the absence of a witness, J.A. 242-44, he observed that "in *not one* of these cases was the absence of the witness sudden or unexpected." J.A. 244. Furthermore, he emphasized, the reliance in all of these state court decisions on "the defendant's prior knowledge of the unavailability of the witness, or circumstances that should have suggested to counsel that the witness would be unavailable at trial," implied that "a truly unexpected absence of a witness," as occurred here, "might excuse failure to comply or relax compliance with the written motion requirements of Rule 24.09 and the content requirements of Rule 24.10." J.A. 246.

Even if the procedural rules were correctly applied, Judge Bennett continued, the rules still would not suffice to bar Lee's federal habeas claims because those rules "should not be applied as a procedural default if the defendant could not be deemed to

have been apprised of their applicability." J.A. 246-47 (citation omitted). It is "simply unrealistic" as a practical matter, the dissent reasoned, to expect that "when confronted during trial with the sudden and unexplained absence of witnesses who have previously been in attendance, both voluntarily and under subpoena, counsel will be able to produce a written motion, supported by an affidavit, as required by Rule 24.09, detailing expressly the information required by Rule 24.10." J.A. 247. Thus, the dissent would have held that the applicability of these rules in Lee's circumstances was "not only not 'firmly established' or 'regularly followed,' it was not 'readily ascertainable.'" *Id.* Judge Bennett would have found that the rules posed no procedural bar for the additional reason that their application would "thwar[t] the assertion of federal rights" in the circumstances of this case. *Id.* (citation omitted).

The dissent highlighted the fact that Lee's affidavits "raise a serious factual issue, which no court has addressed, as to whether state action was responsible for the disappearance of the witnesses from the courthouse in the middle of the day on which their testimony was required." J.A. 251. Finally, as to the underlying merits of Lee's claim, Judge Bennett concluded that "it is hard to conceive of a more arbitrary action of a trial judge that could inflict greater prejudice to a defendant in a criminal case than the actions of the trial judge in Lee's case." J.A. 255; *see also* J.A. 254. The dissent would have remanded the case for an evidentiary hearing on Lee's due process claim. J.A. 255-56.

SUMMARY OF ARGUMENT

For seven years of state and federal postconviction proceedings, Remon Lee has protested that he is innocent of the murder for which he now serves a life sentence without possibility of parole. The jury that convicted him did so on the basis of two eyewitnesses whose credibility was undermined at trial and in the absence of any physical evidence or motive tying Lee to the crime. As he made clear to the jury, Lee intended to present an alibi defense through three family members who

traveled from California to testify that Lee was visiting them at the time of the murder. Lee never had an opportunity to present that alibi evidence, which was so pivotal to his defense, because the trial court denied him a brief continuance to locate his witnesses after they unexpectedly vanished from the courthouse after appearing that morning. Indeed, to date, no court has evaluated the evidence Lee would have presented.

1.a. The right of a defendant to "an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948); *see also Washington v. Texas*, 388 U.S. 14, 19 (1967). The denial of that opportunity in this case was extraordinary. In a first-degree murder prosecution, the trial judge denied a motion for a brief continuance to find witnesses critical to the defense—witnesses who had traveled from California, were under subpoena, and had appeared that morning in the courthouse—because the judge wanted to spend time on a personal matter. It is difficult to imagine a more arbitrary decision. In a case built entirely on eyewitness identifications, the testimony of Lee's alibi witnesses "was all but indispensable to any chance of [Lee's defense] succeeding." *Crane v. Kentucky*, 476 U.S. 683, 691 (1986). In stripping Lee of the chance to present his defense, the trial court denied Lee any semblance of a fair trial or a reliable verdict.

b. Although the reason for his witnesses' disappearance makes no difference to Lee's entitlement to relief, so long as that reason is not traceable to Lee or his counsel, the witnesses maintain that they left because they were told by an "officer of the court" that they were free to leave because they would not be called to testify that day. Such state interference with Lee's right to mount a defense, if established, would afford an additional basis for finding that Lee was denied a fair trial. *See, e.g., Webb v. Texas*, 409 U.S. 95 (1972) (per curiam); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Lee was entitled to an evidentiary hearing in federal court to prove this allegation. He exercised the requisite due diligence, *see (Michael) Williams v. Taylor*, 529 U.S. 420 (2000), in attempting to develop the

factual basis for the claim in state court, but the state courts refused to hold an evidentiary hearing. Hence any lack of factual development is the fault of the state, and 28 U.S.C. § 2254(e)(2) poses no bar to an evidentiary hearing.

2. The court of appeals held that it could not address the merits of Lee's due process claim because the Missouri Court of Appeals determined that the claim was procedurally defaulted as a result of Lee's alleged failure to comply with Missouri Supreme Court Rule 24.09, which requires that a motion for a continuance be in writing and accompanied by an affidavit, and Rule 24.10, which dictates the contents of the proffer to be made when the motion is based on the absence of a witness. Neither rule furnishes an adequate state law ground to defeat consideration of Lee's due process claim.

A state procedural ground is not "adequate" unless the rule is firmly established, regularly followed, and readily ascertainable by the defendant. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). The Missouri courts' application of Rules 24.09 and 24.10 falls woefully wide of that mark. The state courts routinely acknowledge and then forgive violations of both rules, addressing on the merits denials of defective motions for continuances. More fundamentally, even if a failure to comply with these rules would suffice to bar further review in the typical case, Rules 24.09 and 24.10 are not adequate as applied to Lee's unusual situation, where an oral motion for continuance was necessitated by the sudden and unexpected disappearance of Lee's witnesses. Nor is it even apparent which part of the showing required by Rule 24.10 Lee did not satisfy. The trial judge did not deny the requested continuance because there was doubt about what Lee's witnesses would say, but rather, because he had another engagement the next day. To demand that Lee instantaneously generate a written motion and affidavit moments after discovering the disappearance of his witnesses in the midst of trial would be "to force resort to an arid ritual of meaningless form." *Staub v. Baxley*, 355 U.S. 313, 320 (1958).

3. Even if Lee's due process claim is procedurally

defaulted, Lee has demonstrated "cause" and "prejudice" to excuse the default. If there was a procedural default, the sudden disappearance of Lee's alibi witnesses was surely "cause" for the lack of compliance with these rules (if indeed, there was noncompliance). The witnesses' abrupt departure constituted something "external" to the defense that placed counsel in a position in which he could not fully comply with the procedural rules governing continuances. That Lee maintains that a state officer induced the witnesses to leave only strengthens his contention that neither he nor his counsel was at fault for the witnesses' sudden disappearance and that, therefore, any procedural default must be excused. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

The record leaves no doubt that Lee has shown "actual prejudice" as a result of the denial of the continuance. The heart of Lee's defense was his alibi, and the state hardly had an overwhelming case against him. The testimony by Lee's mother, stepfather, and sister would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

4. Finally, Lee has demonstrated that the continued refusal to review his constitutional claim would result in a fundamental miscarriage of justice, the final safeguard to insure that an innocent man does not suffer an unconstitutional deprivation of liberty. In support of this "gateway" claim of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), Lee submitted affidavits from his three alibi witnesses and from Rhodes, the shooter, who swore that Lee was not involved in the murder. If these various statements are true, then no reasonable juror would have voted to convict Lee.

The court of appeals held, however, that Lee could not rely on his affidavits to establish his innocence because their factual basis "existed at the time of the trial and could have been presented earlier." J.A. 235. This new "due diligence" threshold cannot be reconciled with the fact that *Schlup* directed habeas courts to make their determinations concerning a prisoner's innocence in light of *all* the evidence in the case. The

Eighth Circuit's standard strips the miscarriage of justice exception of any power to protect a prisoner who can show that no reasonable juror would have convicted him in light of the new evidence, but who cannot show "cause and prejudice" to excuse a procedural default. If this Court finds that Lee defaulted his due process claim and cannot show cause and prejudice, it should remand for an evidentiary hearing to permit the district court to determine whether, in light of the new evidence, no reasonable juror would have voted to convict.

ARGUMENT

Petitioner recognizes that this Court must first consider whether Lee has procedurally defaulted his due process claim before it may consider the merits of that claim. In order to explain why there is no procedural default here, however, we must first present the merits of Lee's claim and the context in which that claim arose.

I. THE TRIAL COURT'S DENIAL OF A BRIEF CONTINUANCE TO ALLOW LEE TO PRESENT HIS ALIBI WITNESSES VIOLATED LEE'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW, AND HE IS ENTITLED TO AN EVIDENTIARY HEARING TO ESTABLISH WHY THE WITNESSES LEFT.

A. The Trial Court's Denial of the Requested Overnight Continuance Violated Lee's Right to Present a Defense.

More than fifty years ago, this Court recognized that "[a] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948). The fundamental right of a defendant to be heard, to have "his day in court," is worth little if the defendant has no meaningful ability to call witnesses to testify on his behalf. As this Court has emphasized time and again:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). Indeed, "[t]he right of an accused in a criminal trial to due process is, in essence," this Court has explained, "the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). In short, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted).

The trial court's refusal, for purely personal reasons, to grant Lee a brief continuance to present what amounted to his "entire defense," *id.* at 691, is a textbook violation of due process. It is undisputed that Lee's alibi witnesses were under subpoena and had been present in the courthouse on the very day their testimony was needed. As witnesses under subpoena in a criminal case, they were subject to "attachment" under Missouri law. *See* Mo. Sup. Ct. R. 26.03. No evidence has ever been produced that the witnesses' sudden disappearance after traveling more than 1,000 miles to testify on Lee's behalf was somehow attributable to the defendant or his counsel, and indeed, Lee and his counsel were baffled by their unexplained departure from the courthouse. J.A. 17-18. Lee suggested that even a "couple hours' continuance" to try to locate his family members, who he knew were still in town, might suffice, emphasizing that "it's very valuable to my case." J.A. 18.

That was an understatement. Lee's alibi was his entire defense. To be sure, defense counsel had undermined the credibility of Williams and Sanders on cross-examination and

had introduced additional impeachment evidence during the defense case. But, without doubt, Lee's best chance of persuading the jury that the eyewitnesses had identified the wrong man was the testimony of his mother, stepfather, and sister that he was in California at the time the crime was committed, evidence that was not and could not be presented through any other witness. Their testimony "was all but indispensable to any chance of [Lee's defense] succeeding." *Crane*, 476 U.S. at 691. Its absence meant that Lee was forced to defend against eyewitness testimony—essentially to prove a negative—with both hands tied behind his back.

And if the jury had harbored any doubt of Lee's guilt, that doubt was surely removed by Lee's failure to produce the alibi witnesses he had promised and by the prosecutor's exploitation of the witnesses' absence in her closing argument. J.A. 27 ("Where are those alibi witnesses that Mr. McMullin promised you from opening[?] They're not here. No doubt Remon Lee was in town here on August 26th and August 27th."). The circumstances could only have suggested to the jury that Lee's promised alibi defense was a lie, making his guilt of Shelby's murder appear that much more likely.

Faced with the certainty that Lee would be unable to present his alibi defense unless granted a short continuance, the trial court denied a continuance not for any reason related to the merits of the request but because he had planned to stay with his daughter in the hospital on Friday, the following day. J.A. 20, 22. Lee's counsel proposed a continuance until Monday, but again, the court cited the calendar: another trial was scheduled. J.A. 22. His counsel asked for "capiases" (arrest warrants) to bring the witnesses in and informed the court of where he believed the witnesses were staying, but again, to no avail. J.A. 18, 20.[9] Commenting without any factual basis that the

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[9] The trial court's rush to wrap up the case was also evident at several other points during the trial. *See, e.g.*, Tr. 277 (asking, on the second day of trial: "[A]re we getting to this case tried by tomorrow noon? At the present rate we aren't going to make it."); Tr. 440 (stating before recessing

witnesses—who had traveled voluntarily from California at their own expense, were under subpoena, and were present in the courthouse on that same day—apparently had "abandoned" the defendant, J.A. 22, the trial court denied the requested continuance without considering less draconian alternatives and ordered the trial to resume. In so doing, the trial court virtually assured that Lee would spend the rest of his life in prison without ever having had the chance to present his defense that he was not in Missouri when the crime was committed.

This Court has recognized that when a continuance is necessary to present an effective defense, a denial of a continuance may violate due process. "The matter of continuance is traditionally within the discretion of the trial judge and it is not every denial of a request for more time that violates due process . . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citation omitted); *accord Morris v. Slappy*, 461 U.S. 1, 11-12 (1983). The *Ungar* Court acknowledged that there are no "mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," but that "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." 376 U.S. at 589.

That answer is not difficult to come by here. Lee's request for a brief delay was as compelling and as reasonable a request as can be imagined, and the reasons the trial court gave for its denial, utterly capricious. The guaranteed rights to present a defense and to compulsory process are meaningless if they do

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on the second day of trial: "I hope we can get through with this case very quickly in the morning so the jury can go to work."); Tr. 565 (stating, just before the taped interview of Williams was played: "You may play it. Play it fast, would you please."); Tr. 570 (stating just before the lunch break on the last day: "[T]his courtroom is going to be used for a hearing at 2:00, so let's move things along faster.").

not also entail a right to a reasonable recess to secure the attendance of witnesses essential to the defense who have been duly subpoenaed. As the Eighth Circuit dissent observed, "it is hard to conceive of a more arbitrary action of a trial judge that could inflict greater prejudice to a defendant in a criminal case than the actions of the trial judge in Lee's case." J.A. 255 (Bennett, J., dissenting). The trial Lee received was fundamentally unfair and produced a verdict unworthy of confidence. The Great Writ was conceived to provide relief in precisely such circumstances, when the "basic justice of [a petitioner's] incarceration" is at issue. *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976).

On several occasions, this Court has found that the denial of a continuance deprived the defendant of a fair trial in circumstances no more compelling than these. In *Pate v. Robinson*, 383 U.S. 375, 385 & n.7 (1966), for example, the trial court had not held a hearing on the defendant's competence to stand trial and had denied the defendant a few hours' continuance during trial to obtain the testimony of a psychiatrist; this Court granted habeas corpus relief on due process grounds. In *Chandler v. Fretag*, 348 U.S. 3 (1954), the Court granted relief where the defendant had been denied a continuance to obtain counsel regarding the surprise accusation that he was a "habitual criminal," when he had been prepared to plead guilty only to the indicted offense. On review of the denial of state habeas corpus relief, this Court held that the denial of a continuance violated due process because it effectively denied him the right to counsel. *Id.* at 9-10; *accord Reynolds v. Cochran*, 365 U.S. 525, 530 (1961) (applying *Chandler* to similar facts). Similarly here, Lee and his counsel were surprised to learn at trial that his main defense witnesses had vanished. The trial court denied Lee's request for a continuance to locate the witnesses and arrest them if necessary, thereby effectively stripping Lee of his right to present witnesses

vital to his defense.[10]

B. This Court Should Remand for an Evidentiary Hearing to Determine Whether a State Official Told Lee's Witnesses That They Could Leave.

Lee was denied due process for an additional reason: his alibi witnesses maintain that the reason they left the courthouse is because they were told by an "officer of the court" that they were free to leave because they would not be called to testify that day. J.A. 169, 172, 174. The Due Process Clause forbids state officials from interfering with the presentation of a criminal defense. *See, e.g., Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (per curiam) (holding that trial court deprived petitioner of due process of law when it threatened and harassed a defense witness). Nor may the prosecution interfere with the defendant's right to marshal and present evidence in his defense. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963); *cf. Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (per curiam) (granting federal habeas relief where the exclusion from the record on appeal of transcript of counsel's closing arguments at sentencing was attributable to "the State's own erroneous assertions that closing arguments had not been transcribed"). If a court officer or a prosecutor told the witnesses that they were free to leave, that interference with Lee's defense violated his right to due process.

Lee was entitled to an evidentiary hearing to prove that

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[10] The federal courts of appeals generally agree that it is a violation of due process to deny a continuance in cases like this one, where the witnesses were crucial to the defense, the reason for the denial was arbitrary, the defendant had not created the need for the continuance, and/or the requested continuance was brief. *See, e.g., United States v. Mejia*, 69 F.3d 309, 314-19 (9th Cir. 1995); *Manlove v. Tansy*, 981 F.2d 473, 476-79 (10th Cir. 1992); *Bennett v. Scroggy*, 793 F.2d 772, 774-77 (6th Cir. 1986); *Dickerson v. Alabama*, 667 F.2d 1364, 1369-71 (11th Cir. 1982); *Hicks v. Wainwright*, 633 F.2d 1146, 1147-50 (5th Cir. 1981); *Singleton v. Lefkowitz*, 583 F.2d 618, 623-24 (2d Cir. 1978); *see also Johnson v. Johnson*, 375 F. Supp. 872, 873-76 (W.D. Mich. 1974).

charge. The district court refused to consider the witnesses' affidavits or to hold a hearing because, despite his access to his family members and the reason for their departure, Lee did not develop the factual basis of this claim in state court and could not meet the burden of 28 U.S.C. § 2254(e)(2). J.A. 215. The court of appeals did not address the issue on appeal.[11]

The district court's conclusion, which predated this Court's decision in *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000), in which this Court construed section 2254(e)(2), rests on an incorrect interpretation both of the requirements of section 2254(e)(2) and of the Missouri postconviction statute under which Lee was proceeding in state court. Lee presented this claim in compliance with Missouri postconviction procedure, and thus the fault for any lack of factual development lies with the state, not Lee.

As this Court explained in *Williams*, "[b]y the terms of its opening clause [§ 2254(e)(2)] applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings.' If the prisoner has failed to develop the facts, an evidentiary hearing cannot be granted unless the prisoner's case meets the other conditions of § 2254(e)(2)." 529 U.S. at 430. "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. "Diligence," the Court explained, "will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

Lee demonstrated the requisite diligence in state court. He alleged in his amended state postconviction motion under Rule

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[11] Note that whether Lee failed to comply with Missouri Supreme Court Rules 24.09 and 24.10, as discussed below in Part II, is relevant only to the question of whether he procedurally defaulted his due process claim based on the denial of the continuance, as described in Part I.A., and not to his contention that he is entitled to an evidentiary hearing regarding why his witnesses left.

29.15 that he was denied due process when his alibi witnesses were "told by an unknown person that they could leave the courthouse because they were not needed to testify." J.A. 56; *see also* J.A. 57-59. Lee made a timely request for an evidentiary hearing, J.A. 54, 62, which was denied by the postconviction court, J.A. 75, and then affirmed on appeal. J.A. 131.

Lee's allegations were sufficient under state law to require an evidentiary hearing. Lee did not submit affidavits to the state postconviction court, but Rule 29.15 did not require that he do so. Rule 29.15(d), which specifies the required contents of the motion, requires only that the defendant verify his motion, as Lee did here. J.A. 52, 64. A defendant need only *plead*—not prove—facts in a Rule 29.15 motion which, if true, entitle him to an evidentiary hearing. *Missouri v. Driver*, 912 S.W.2d 52, 56 (Mo. 1995). To receive an evidentiary hearing under Rule 29.15, the movant must meet three requirements: (1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not conclusively refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant. *Driver*, 912 S.W.2d at 55 (remanding for an evidentiary hearing where defendant's motion pleaded facts supporting his claim of ineffective assistance of counsel which, if true, warranted relief and were not conclusively refuted by the record); *Missouri v. Watson*, 806 S.W.2d 677, 680 (Mo. Ct. App. 1991) (remanding for an evidentiary hearing); *see also* Rule 29.15(g); *Missouri v. Yates*, 869 S.W.2d 270, 272-73 (Mo. Ct. App. 1994); *Jones v. Missouri*, 771 S.W.2d 349, 351 (Mo. Ct. App. 1989).

Lee was entitled to an evidentiary hearing under this standard. His amended Rule 29.15 motion set forth several pages of factual allegations identifying his alibi witnesses, describing their proposed testimony, and explaining that a state official had told them they could leave. J.A. 56-59. If proved, his allegations would warrant relief. The facts alleged by Lee were not refuted by the record in the case; indeed, the record was silent as to why the witnesses left. And finally, the state's

alleged interference with the availability of witnesses central to Lee's defense prejudiced Lee and denied him a fair trial. Thus, Lee made a motion sufficient to merit an evidentiary hearing under Missouri law. Because Lee did not "fail" to develop the factual basis of his claim in state court, section 2254(e)(2) poses no bar to an evidentiary hearing. *See Williams*, 529 U.S. at 435 ("[O]nly a prisoner who has neglected his rights in state court need satisfy" the conditions set out in § 2254(e)(2)(A) & (B)).

The only remaining issue, then, is whether Lee is entitled to an evidentiary hearing under the standards of *Townsend v. Sain*, 372 U.S. 293 (1963). Because Lee has "allege[d] facts which, if proved, would entitle him to relief" and did not receive "a full and fair evidentiary hearing in a state court," the district court was required to conduct an evidentiary hearing on this issue. *Id.* at 312; *see also Blackledge v. Allison*, 431 U.S. 63, 76 (1977) (remanding for further proceedings where petitioner's allegations were not so "palpably incredible" or so "patently frivolous or false" as to warrant summary dismissal).

II. LEE'S DUE PROCESS CLAIM IS NOT PROCEDURALLY DEFAULTED BECAUSE THE DECISION OF THE MISSOURI COURT OF APPEALS DID NOT REST ON "ADEQUATE" STATE LAW GROUNDS.

The Eighth Circuit did not reach the merits of Lee's claim that the denial of a continuance violated his right to due process because it concluded that the claim was procedurally defaulted as a result of Lee's alleged failure to comply with Missouri Supreme Court Rules 24.09 and 24.10. J.A. 234. This conclusion was in error. As Judge Bennett explained at length in his dissent, J.A. 239-56, the decision of the Missouri Court of Appeals did not rest on any adequate state law ground.

This Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997) (quoting *Coleman v. Thompson*, 501 U.S.

722, 729 (1991)). Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of a federal claim unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986)), or can demonstrate that a failure to consider the federal claim will result in a "fundamental miscarriage of justice." *Id.* (quoting *Carrier*, 477 U.S. at 495) (citation and internal quotation marks omitted). This heightened standard, this Court has emphasized, is predicated on the need to deter "intentional defaults" or "sandbagging" by the defense, and on "a judgment that the costs of federal habeas review 'are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts.'" *Carrier*, 477 U.S. at 487 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)); *accord Sykes*, 433 U.S. at 89-90.

As discussed below, the "independent and adequate state ground" doctrine has no application here because neither Rule 24.09, which requires that a motion for a continuance be made in writing and accompanied by an affidavit, nor Rule 24.10, which sets forth the showing required when the motion is predicated on the absence of a witness (*e.g.*, materiality, due diligence, and good faith), can defeat review of Lee's due process claim where defense counsel did all he could possibly be expected to do, given the exigencies, to present Lee's request for a continuance to the trial court.

A. Missouri Supreme Court Rules 24.09 and 24.10 Are Not Consistently Followed.

This Court has "consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (citation omitted).

A state procedural ground is not "adequate" unless the rule is "firmly established," "regularly followed," and readily

ascertainable by the defendant. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); *see also Coleman*, 501 U.S. at 758 (White, J., concurring). The Missouri appellate courts' application of Rules 24.09 and 24.10 to motions for continuances falls far short of this standard. On occasions too numerous to catalog fully here, the Missouri courts have overlooked deficiencies in compliance with both rules and reached the merits of the denials of these deficient motions for continuances (albeit only to affirm the denials on other grounds). For example, the Missouri courts routinely forgive violations of Rule 24.09 and address denials of oral motions for continuances on the merits. In *Missouri v. Peters*, 731 S.W.2d 480, 482 (Mo. Ct. App. 1987), for instance, the Missouri Court of Appeals noted that the motion for continuance was not in writing or accompanied by an affidavit, but then reached the merits, holding that it was "not necessary for us to strictly enforce Rule 24.09 because we find no abuse of discretion in denying defendant's oral motion for continuance." To the same effect was *Missouri v. Ruth*, 830 S.W.2d 24, 25, 27 & n.4 (Mo. Ct. App. 1992), where the court discussed the merits of a denial of an oral request for a continuance, while expressly stating: "We do not reach the state's argument that the defendant's request for a continuance did not comply with applicable supreme court rules."[12]

Even more commonly, the Missouri appellate courts mention that a given request for a continuance was made orally, but then address the merits of the appeal from the denial of the

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[12] Other instances where the Missouri appellate courts acknowledged a defendant's failure to comply with Rule 24.09 and nevertheless reached the merits of the denial of the continuance include: *Missouri v. Johnson*, 812 S.W.2d 940, 943 (Mo. Ct. App. 1991); *Missouri v. Stout*, 675 S.W.2d 931, 935 (Mo. Ct. App. 1984); *Missouri v. Wade*, 666 S.W.2d 869, 870-71 (Mo. Ct. App. 1984); *Missouri v. Smith*, 633 S.W.2d 412, 416-17 (Mo. Ct. App. 1982); *Missouri v. Jordan*, 639 S.W.2d 400, 401 (Mo. Ct. App. 1982); *Missouri v. Winston*, 627 S.W.2d 915, 918 (Mo. Ct. App. 1982).

request—either without acknowledging the noncompliance with Rule 24.09 at all, *see, e.g., Missouri v. Schaal*, 806 S.W.2d 659, 666-67 (Mo. 1991) (reaching merits of oral motion for continuance that was based on counsel's need for more time to prepare); *Missouri v. Greathouse*, 694 S.W.2d 903, 907-08 (Mo. Ct. App. 1985) (addressing merits of denial of oral request for a continuance to obtain an alibi witness),[13] or citing the rule only in passing or as an afterthought. *See, e.g., Missouri v. Merrick*, 677 S.W.2d 339, 342 & n.2 (Mo. Ct. App. 1984) (finding no abuse of discretion in denial of defendant's oral request for continuance and then noting that the motion failed to comply with Rule 24.09); *see also Missouri v. Downen*, 3 S.W.3d 434, 438 (Mo. Ct. App. 1999); *Missouri v. Kechrid*, 822 S.W.2d 552, 555 (Mo. Ct. App. 1992).

So, too, have the Missouri appellate courts been willing to overlook deficiencies in defendants' compliance with Rule 24.10 as to the showing required when the motion is predicated on the absence of a witness. In *Missouri v. Richardson*, 718 S.W.2d 170 (Mo. Ct. App. 1986), for example, the defendant had made a motion for a continuance on the grounds that his counsel was inadequately prepared and that he wanted to obtain the presence of alibi witnesses. The Missouri Court of Appeals observed that the defendant had failed to provide details concerning the witnesses, as required by Rule 24.10, but then explained that it would "review this issue ex gratia," and passed on the merits of the request. *Id.* at 172.

In still other instances, the Missouri courts have remarked on defects in the showing made for the requested continuance—*e.g.*, the defendant failed to demonstrate the materiality of the absent witness's testimony or due diligence in attempting to obtain the witness's presence—but then upheld

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[13] *See also Missouri v. Bell*, 719 S.W.2d 763, 767 (Mo. 1986); *Missouri v. Haggard*, 619 S.W.2d 44, 46-47 (Mo. 1981), *vacated on other grounds*, 459 U.S. 1192 (1983); *Missouri v. Petterson*, 780 S.W.2d 675, 679 (Mo. Ct. App. 1989); *Missouri v. Adkins*, 678 S.W.2d 855, 858 (Mo. Ct. App. 1984); *Missouri v. Stout*, 604 S.W.2d 710, 715-16 (Mo. Ct. App. 1980).

the denial of the continuances on the merits without citing Rule 24.10 as a procedural bar. *See, e.g., Missouri v. Davis*, 625 S.W.2d 903, 905 (Mo. Ct. App. 1981) (upholding denial of continuance on the merits where no information was given the court as to what the absent witness's testimony would be); *Missouri v. Ashley*, 616 S.W.2d 556, 558 (Mo. Ct. App. 1981) (affirming denial of continuance on the merits while noting that the record did not indicate that the absent witness could have been found if more time had been allowed).

Such decisions call into question whether Rule 24.10 can even be deemed a procedural state rule that is separate from the merits. In contrast to Rule 24.09, which sets forth a distinct procedural requirement that a motion for continuance be made in writing, Rule 24.10 describes the actual substantive showing required to obtain a continuance when the motion is based on the absence of a witness. This showing merges with the merits of the request, as is evidenced by any number of Missouri decisions finding no abuse of discretion by the trial court in denying a request for a continuance where elements required by Rule 24.10 (such as materiality or the likelihood that the witness can be procured within a reasonable time) were missing. *See, e.g., Missouri v. Lachterman*, 812 S.W.2d 759, 762-63 (Mo. Ct. App. 1991) (affirming denial of continuance where trial court could reasonably conclude that the missing witness would not be found).[14] Indeed, whether a particular denial of a continuance is so arbitrary as to violate due process *depends* on "the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). In other words, in affirming denials of continuances where an inadequate showing was made regarding absent witnesses, the Missouri appellate courts are in actuality reaching the merits of these appeals, rather than enforcing a procedural bar.

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[14] *See also Fuller v. Missouri*, 837 S.W.2d 304, 306-07 (Mo. Ct. App. 1992); *Missouri v. McLaurin*, 684 S.W.2d 570, 570 (Mo. Ct. App. 1984); *Missouri v. Green*, 647 S.W.2d 902, 903-04 (Mo. Ct. App. 1983).

For all of these reasons, it cannot be said that the Missouri courts apply Rules 24.09 and 24.10 "evenhandedly to all similar claims," *Hathorn*, 457 U.S. at 263, or have "so consistently applied" these rules "as to amount to a self-denial of the *power* to entertain the federal claim here presented." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234 (1969).

B. Rules 24.09 and 24.10 Are Not Adequate to Defeat Review of Lee's Due Process Claim in These Particular Circumstances.

More importantly, however, even if a failure to comply with Rules 24.09 and 24.10 is sufficient to preclude further review in the typical case, the rules are not adequate as applied here. *See Michel v. Louisiana*, 350 U.S. 91, 95 (1955) ("[I]n the circumstances of a particular case, the application of [a procedural rule] may not give a reasonable opportunity to raise the federal question."). There is no disputing the fact that the Missouri appellate courts have affirmed denials of oral motions for continuances made during or near the time of trial that were prompted by the absence of a witness because the motions did not comply with Rules 24.09 or 24.10. But, as Judge Bennett observed below, in not one of these cases was the absence of the witness sudden or unexpected, J.A. 244; nor did any of these cases involve circumstances even remotely as compelling as these. *See, e.g., Missouri v. Wolfe*, 13 S.W.3d 248, 261 (Mo. 2000) (upholding denial of oral motion for continuance made during trial where "no one had seen [the missing witness] in weeks"); *Missouri v. McCarter*, 820 S.W.2d 587, 589 (Mo. Ct. App. 1991) (affirming denial of oral motion for continuance on morning of trial when absence of witness was a "matter well known before trial" and defendant conceded that witness "may not ever be located or produced").[15]

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[15] *See also Missouri v. Dodd*, 10 S.W.3d 546, 555 (Mo. Ct. App. 1999) (defendant "conceded in his motion that he had not been able to locate the confidential informants for several months before his trial"); *Fuller*, 837 S.W.2d at 306 (witness "had been missing for more than a year, despite extensive efforts to locate her by both sides"); *Lachterman*, 812 S.W.2d at 762-63 (trial court had already granted three continuances to find the missing witness, including a search by a private investigator); *Missouri v. Anderson*, 785 S.W.2d 299, 302 (Mo. Ct. App. 1990) (improbable that personal presence of the missing witness could be obtained and no showing of a request for a subpoena to compel her attendance); *Missouri v. Tettamble*, 746 S.W.2d 433, 439-40 (Mo. Ct. App. 1988) (defendant never verified where the absent witness could be found or that the writ to compel his attendance had been served before trial).

In fact, as the dissent concluded, the reliance in all of these decisions on the defendant's prior knowledge of the unavailability of the witness suggests that "a truly unexpected absence of a witness, as occurred in this case, might excuse failure to comply or relax compliance" with the requirements of Rules 24.09 and 24.10. J.A. 246; *see, e.g., McCarter*, 820 S.W.2d at 589 (stating that the failure to comply with Rule 24.09 was sufficient grounds to affirm the denial of the continuance and that "[t]his is particularly true where the factual basis for the motion was not a last minute or unexpected surprise"); *Missouri v. Adams*, 808 S.W.2d 925, 930 (Mo. Ct. App. 1991) (commenting that had the absent witnesses "been subpoenaed in timely fashion, had their absence resulted from illness, accident or some other unexpected cause," appellant's argument in support of his oral motion for continuance would have been stronger).

Indeed, the trial court's refusal to grant even a short delay or issue a writ of body attachment, and the absence of any other assistance by the trial court or the state in finding Lee's witnesses, contrasts sharply with several other Missouri cases in which defendants had made procedurally defective motions for continuances which were denied only after other options had been explored. *See, e.g., Wolfe*, 13 S.W.3d at 261 (state had also attempted to find missing witness); *Missouri v. Sneed*, 874 S.W.2d 489, 491 (Mo. Ct. App. 1994) (trial court granted a several hour recess and issued a "body attachment" for an absent defense witness); *Missouri v. Coats*, 835 S.W.2d 430, 433-34 (Mo. Ct. App. 1992) (trial court granted continuance

early on Friday afternoon and over weekend for the sole purpose of allowing an absent defense witness, who had not been subpoenaed, to testify); *Missouri v. Gasaway*, 720 S.W.2d 3, 5 (Mo. Ct. App. 1986) (trial court issued writ of body attachment for subpoenaed witness and defendant acknowledged that "the Sheriff made a diligent effort to locate [the witness] but was unable to do so"). As the Missouri Court of Appeals remarked in *Adams*:

> It might have been possible to proceed with the trial and present all of the available witnesses for each side, then recess overnight to see whether the Johnstons could be produced the following day. However, appellant's lawyer did not request that, nor did he offer any clue as to when the Johnstons might be found.

808 S.W.2d at 929-30. Here, by contrast, Lee requested exactly that—an overnight recess to produce his witnesses who, unlike the missing witnesses in *Adams*, had been subpoenaed, had appeared in court, and were known to be staying in town at a relative's home. For these reasons, even if Rules 24.09 and 24.10 could be viewed "in retrospect to form part of a consistent pattern of procedures," the rules would remain insufficient to bar review of Lee's due process claim because he could not be "deemed to have been apprised of" their applicability in these unusual circumstances. *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)).

More importantly, there was no way for Lee to comply with the requirement of Rule 24.09 that his motion for a continuance be in writing at the moment he discovered his witnesses had suddenly left, J.A. 247, 251 (Bennett, J., dissenting). Lee did, however, raise the denial of the continuance in his written motion for a new trial, *see* J.A. 31-32, and at every stage of the state court proceedings thereafter. Not surprisingly, neither the trial court nor the prosecutor cited that procedural deficiency during the colloquy

on the motion. The prosecutor did not even object to the requested continuance. Nor did the state argue on direct appeal that the denial of the continuance should be affirmed because of a failure to comply with Rule 24.09, underscoring still further the lack of any legitimate state interest in applying that procedural rule under these circumstances.

As for Rule 24.10, it is not even apparent, as the dissent observed, which part of the rule was not satisfied, either by Lee's limited-purpose testimony on the stand, counsel's representations at the time he moved for a continuance, or by counsel's detailed discussion of the alibi testimony in his opening statement the day before. J.A. 249-51 (Bennett, J., dissenting); *see Ward v. Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920) (a non-federal ground for decision is inadequate if it is "without any fair or substantial support"). First, Rule 24.10(a) requires that the application for a continuance show facts regarding the "materiality of the evidence sought to be obtained" and "due diligence" on the part of the applicant to obtain such witness or testimony. Here the materiality of the alibi testimony was obvious and unquestioned. Lee's counsel had explained at length in his opening statement that the witnesses would testify that Lee was in California, not Kansas City, at the time of the murder, J.A. 12-13, and had reminded the trial court of the identity of the witnesses during the exchange regarding the continuance. J.A. 16. Lee's due diligence in attempting to obtain the presence of the witnesses was equally evident, as the witnesses had previously appeared and were under subpoena. *See Missouri v. Johnson*, 618 S.W.2d 191, 194-95 (Mo. 1981) (per curiam) (state's previous issuance of subpoena to absent witness showed that it had exercised due diligence to obtain the witness's presence).

Second, Rule 24.10(b) requires the name and residence of such witness, if known, and "facts showing reasonable grounds for belief" that the attendance or testimony of such witness "will be procured within a reasonable time." Lee's counsel provided the name of each of the witnesses and the local address where they were staying. J.A. 16, 17, 20. Lee established "reasonable

grounds for belief" that the attendance of the witnesses would be "procured within a reasonable time" when he testified that he knew that the witnesses were still in town because his stepfather had a religious event to attend that night and the next. J.A. 18.

Third, Rule 24.10(c) requires a showing of the "particular facts" the applicant believes the witness will prove and that he knows of no other person whose evidence or attendance he could have procured at trial who could prove or so fully prove the same facts. In this case, counsel had outlined in his opening statement only the day before the "particular facts" the alibi witnesses would prove, and it was evident that no other testimony could establish Lee's alibi defense.

Finally, Rule 24.10(d) requires that the applicant show that the witness is not absent by the "connivance, consent, or procurement of the applicant." The undisputed testimony and representations of Lee and his counsel that the witnesses had been present at the courthouse before the lunch recess, that they had no idea why the witnesses had not returned, and that Lee's girlfriend was searching for them, J.A. 16-18, were more than sufficient to satisfy the requirements that the witness not be absent for reasons attributable to the defendant and that the request not be made "for vexation or delay, but in good faith." Rule 24.10(d). Lee's showing prompted the dissent below to remark: "it is impossible to imagine that counsel could have done more to meet the requirements of Missouri Supreme Court Rules 24.09 and 24.10." J.A. 249. What the Court held in *James v. Kentucky* has equal force here: "Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here." 466 U.S. at 351.

Whether the Missouri Court of Appeals correctly interpreted them or not, Rules 24.09 and 24.10 cannot defeat Lee's due process claim because they serve no conceivable state interest in this instance—both because technical compliance would have been impossible and because the prosecutor and the trial court received all of the information the rules require. As the Missouri Court of Appeals has explained, "[t]he reason for

[these] rules is obvious. It is to permit the court to pass upon the merits of a request for a continuance." *Missouri v. Fletcher*, 758 S.W.2d 476, 478 (Mo. Ct. App. 1988). Lee's request for a continuance fulfilled that state interest. The trial judge denied the request on the merits. He did so not because he was in the dark about what Lee's witnesses were expected to prove, but rather, because he had another engagement the next day. Rules 24.09 and 24.10 cannot, consistent with due process, be applied to bar consideration of a meritorious constitutional claim where the exigencies prevented literal obedience, any more than a rule requiring that a motion for continuance be filed ten days in advance could be applied to bar review of a constitutional claim stemming from the sudden need for a continuance.

As this Court has recognized, a state procedural ground is "adequate" only where "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Wainwright v. Sykes*, 433 U.S. 72, 83 n.8 (1977) (citation omitted); *accord Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). To require Lee to generate instantly a written motion and affidavit moments after discovering the disappearance of his witnesses in the midst of trial would exalt form over substance, "forc[ing] resort to an arid ritual of meaningless form." *Staub v. Baxley*, 355 U.S. 313, 320 (1958). A long line of precedents from this Court confirm that when a defendant has brought the substance of his claim to the state court's attention, the state's formalistic interest in its rules is inadequate to bar review of the defendant's federal claim. *See Trevino v. Texas*, 503 U.S. 562, 566-67 (1992) (per curiam) (applying *Ford v. Georgia* to find that petitioner effectively "presented his equal protection claim to the trial court" even though his "assertion of his rights" may have been "inartful[]"); *James*, 466 U.S. at 349 (holding that to insist on a particular label for defendant's requested admonition to the jury "would further no perceivable state interest"); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam) (granting relief where the Alabama Supreme Court refused to entertain review because the petition was not filed on

the right kind of paper).[16]

"The consideration of asserted constitutional rights may not be thwarted," this Court has recognized, "by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (finding no adequate state law ground barring federal review where the Alabama courts had not previously applied their rules "with the pointless severity shown here"). The oft-quoted assertion by Justice Holmes of the primacy of plainly asserted federal rights is especially apt here: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *see also* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1142 (1986) ("[T]he most important category of inadequate state grounds includes those rules that, even if fairly and consistently applied, heavily burden the assertion of federal rights without

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[16] *See also Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (concluding that the Court could reach petitioner's due process claim because his attorney had pressed the issue of the state's failure of proof on lewdness before the trial court and "nothing would be gained by requiring [him] to object a second time, specifically to the jury instructions"); *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965) ("[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."); *Henry v. Mississippi*, 379 U.S. 443, 448 (1965) (suggesting that Mississippi's interest in its contemporaneous objection rule may have been "substantially served" by petitioner's motion for directed verdict); *Brown v. Western Ry.*, 338 U.S. 294, 295-96 (1949) (rejecting application of local rule that barred review of claim because of the lack of a precise allegation that the "particular clinker" on which petitioner stumbled was there because of respondent's negligence); *Rogers v. Alabama*, 192 U.S. 226, 229-31 (1904) (rejecting the adequacy of a state law ground barring review of motion to quash the indictment because of its "prolixity").

significantly advancing any important state policy.").

Lee's request for a continuance contrasts strikingly with the defendants' failures to comply with the state procedural rules in *Wainwright v. Sykes* and its progeny, many of which involve a failure to make a contemporaneous objection or to meet a deadline. There was no like failing here on the part of the defense. The rationale for extending the "independent and adequate state law ground" doctrine to federal habeas corpus cases is simply inapposite where the petitioner has given the state courts every opportunity, at every stage of the proceedings, to rectify the fundamental error that occurred when the trial court denied Lee a brief continuance. *Compare Murray v. Carrier*, 477 U.S. 478, 487 (1986) (procedural defaults at trial deprive the state courts of the opportunity to correct errors). It was the trial court's refusal to grant a few hours' continuance to permit Lee to locate his witnesses and to present his defense, and the subsequent refusal of the state appellate courts to correct the error, that "detract[ed] from the perception of the trial . . . as a decisive and portentous event." *Sykes*, 433 U.S. at 90. It was this unwillingness, rather than a failure on the part of Lee to bring the issue to the trial court's attention, that made these federal habeas proceedings necessary. This Court's procedural default jurisprudence imposes on criminal defendants only "a burden of reasonable compliance" with state procedural rules. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Far from having intentionally, or even inadvertently, defaulted his federal constitutional claim, Lee, as he said in his pro se Petition for Certiorari, at 12, "did everything a [p]etitioner could do in state court to present his federal violation for the courts' review."

III. LEE HAS SHOWN "CAUSE" AND "PREJUDICE" TO EXCUSE ANY PROCEDURAL DEFAULT.

Even assuming that Lee's due process claim is procedurally barred, he has demonstrated "cause and prejudiee" to excuse the default.

A. Cause. In this case, the question of whether Lee can

show "cause" to excuse any procedural default is simply the flipside of the question whether his due process claim was defaulted at all. Examination of his alleged noncompliance with Rules 24.09 and 24.10 from this perspective leads to the same result: Lee is entitled to review on the merits of his due process claim.

If there was a procedural default because the motion for a continuance was not in writing or because Lee failed to make a formal proffer of the elements required by Rule 24.10, the sudden disappearance of Lee's alibi witnesses was surely "cause" for the lack of compliance with these rules (if indeed, there was noncompliance). Although it has resisted giving the term "cause" any fixed content, *Smith v. Murray*, 477 U.S. 527, 533-34 (1986); *Reed v. Ross*, 468 U.S. 1, 13 (1984), this Court has explained that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Carrier*, 477 U.S. at 488. The witnesses' abrupt departure mid-trial certainly was "something *external* to the petitioner, something that cannot fairly be attributed to him," *Coleman v. Thompson*, 501 U.S. 722, 753 (1991), that would have impeded counsel's ability to comply with the state's rules.

That Lee contends that a state officer induced the witnesses to leave, as discussed in Part I.B., only bolsters the argument that neither Lee nor his counsel was at fault for the witnesses' abrupt departure and that therefore, any procedural default should be excused. If a state officer told the witnesses they could leave, then Lee has made a classic showing of "cause" for any failure to make the request for a continuance in proper form. *See Carrier*, 477 U.S. at 488 ("some interference by officials" that "made compliance impracticable" would constitute cause); *see also Strickler v. Greene*, 527 U.S. 263, 283 (1999) (finding "cause" where "conduct attributable to the State" impeded trial counsel's access to the factual basis for his claim); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (finding "cause" where petitioner's failure to raise a jury challenge in the

trial court was attributable to the concealment of evidence by the state).

The writ of habeas corpus "has traditionally been regarded as governed by equitable principles." *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion) (citation omitted). These equitable principles have led this Court's procedural default jurisprudence to "concentrate on petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey*, 499 U.S. at 490. If, for whatever reason—as long as that reason is not traceable to Lee or his counsel—the alibi witnesses abruptly left the courthouse before they were to testify, placing counsel in a position where he could not fully comply with the procedural rules governing motions for continuances, then Lee has a "legitimate excuse" for any deficiency with his motion.

Neither the court of appeals nor the district court addressed this argument. Because his allegations, if proved, would establish cause for any default, Lee is entitled, at the very least, to an evidentiary hearing to determine why his witnesses left. *See id.* at 494 ("The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard."); *Amadeo*, 486 U.S. at 219 (noting that the lower court had remanded for an evidentiary hearing on cause).

B. Prejudice. The record in this case leaves no doubt that Lee has also shown "actual prejudice as a result of the alleged violation of federal law." *Coleman*, 501 U.S. at 750. Although this Court has also "refrained from giving 'precise content' to the term 'prejudice,'" *United States v. Frady*, 456 U.S. 152, 168 (1982) (citation omitted), it has demanded a showing that the constitutional error "worked to [the petitioner's] *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170. In other words, Lee must show that he was denied "fundamental fairness" at trial. *Carrier*, 477 U.S. at 494.

Finding no cause to excuse the alleged procedural default,

the court of appeals majority did not reach the issue of prejudice. J.A. 235; *cf.* J.A. 254-55 (Bennett, J., dissenting). The prejudice from the trial court's denial of a continuance to permit Lee an opportunity to present his alibi witnesses, however, is manifest. As discussed in Part I, the heart of Lee's defense was his alibi. And the state hardly had an overwhelming case against him, based, as it was, on the testimony of two eyewitnesses—one of whom identified him for the first time at trial, a year and a half after the shooting took place—and both of whom saw the driver of the truck only for a matter of seconds and then only from the shoulders up. *Cf. Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (noting "such important details" as the fact that two eyewitnesses had their best views of the gunman only as he fled the scene with his body partly concealed in a car). The descriptions the two eyewitnesses gave of the driver did not even match, as Sanders testified that the driver was wearing sunglasses, while Williams said that the driver was not wearing glasses. Tr. 276, 404. There was no physical evidence tying Lee to the scene of the crime or any evidence of motive. The victim's sister and neighbor, neither of whom was disinterested, testified that they saw Lee with Rhodes the night before the shooting, but they allegedly saw him at night under viewing conditions that were less than ideal, and neither of them spoke to the man they claimed was Lee.

That Lee was convicted and now serves a life sentence on the basis of eyewitness testimony alone, without any opportunity to present his defense that he was elsewhere at the time of the crime, is deeply troubling. "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).[17] The testimony by

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[17] *See* U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* xiv, 15, 24 (1996) (reporting that in virtually all 28 cases in which, as of early 1996, convicted defendants had been exonerated by DNA evidence, the triers of fact had relied on eyewitness identifications which turned out to be wrong), *available at* http://www.ojp.usdoj.gov/nij/for96.htm. In one case, five witnesses testified that they had seen the defendant with the nine-year-old victim on the day of the murder. *Id.* at 15; *see also* Helen O'Neill, *The Perfect Witness*, Wash. Post, Mar. 4. 2001, at F1 (describing the exoneration of a man sentenced to life imprisonment for rape based almost exclusively on the victim's eyewitness testimony).

Lee's mother, stepfather, and sister, who traveled from California to attest to the fact that Lee had been visiting them when Shelby was shot, certainly could have made a difference. Their testimony would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Adding to the demonstrable prejudice from Lee's inability to put on his alibi defense is the fact that the jury had been promised an alibi defense by Lee's counsel in his opening statement and during voir dire and then reminded of his failure to fulfill that promise by the prosecutor in her closing argument. J.A. 10-13, 27. The circumstances should compel a determination that the defendant did not receive "a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler*, 527 U.S. at 290 (citation omitted). Lee has made the requisite showing of prejudice.

IV. LEE IS ENTITLED TO A HEARING TO EVALUATE WHETHER HE IS ACTUALLY INNOCENT OF THE CRIME.

The very nature of the writ of habeas corpus demands "that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). To that end, this Court has continually reaffirmed that principles of comity and finality "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *accord Schlup*, 513 U.S. at 320-21; *Smith v. Murray*, 477 U.S. 527, 537 (1986); *Carrier*, 477 U.S. at 495.

Thus, a petitioner may secure review of a defaulted federal constitutional claim, even in the absence of "cause and prejudice" to excuse the default, if "he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Schlup*, 513 U.S. at 314-15 (quoting *McCleskey*, 499 U.S. at 494). The miscarriage of justice exception to "cause" serves as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *McCleskey*, 499 U.S. at 495 (quoting *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976)). The exception is met if the petitioner can show "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327 (remanding for further consideration of Schlup's claim of actual innocence).

For more than seven years of state and federal proceedings, Lee has protested his innocence of Shelby's murder. In support of his "actual innocence" claim, which he asserts under *Schlup* as a "gateway" to his underlying due process claim, Lee submitted to the district court the affidavits of his three alibi witnesses, all of whom state that Lee was in California in August 1992 when Shelby was killed. J.A. 168-74. Curiously, the state did not call Rhodes, the shooter, who had already pleaded guilty, to testify against Lee at trial. Lee, however, submitted to the district court an affidavit from Rhodes, contending that Lee "was not present, nor involved in the shooting death of Mr. Steve Shelby." J.A. 166. As was the case in *Schlup*, in which new statements cast doubt on whether the petitioner had been involved in the murder in that case, Lee's "new statements may, of course be unreliable. But if they are true . . . it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Schlup*, 513 U.S. at 331.

A. The court of appeals held, however, that Lee had failed to prove his actual innocence because the factual basis for the affidavits upon which he relies "existed at the time of the trial and could have been presented earlier." J.A. 235 (citing

Meadows v. Delo, 99 F.3d 280, 282 (8th Cir. 1996)); *see also Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (en banc) (holding that evidence is "new" within the meaning of *Schlup* only if it was "not available at trial and could not have been discovered earlier through the exercise of due diligence"), *cert. denied*, 523 U.S. 1123 (1998). This new due diligence standard, derived from earlier Eighth Circuit cases dealing either with freestanding claims of innocence based on newly discovered innocence or abuses of the writ, *e.g.*, *Meadows*, 99 F.3d at 282; *Smith v. Armontrout*, 888 F.2d 530, 541 (8th Cir. 1989), is not only perverse as applied here, where Lee has strived diligently to present his alibi evidence both at trial and at every state and federal proceeding ever since, but is flatly inconsistent with *Schlup* and other decisions of this Court.

As Judge Jean Hamilton, the same district court judge who decided *Schlup*, explained in a thoughtful opinion, reliance on abuse-of-the-writ case-law "to define 'new evidence' in a *Schlup* claim is inappropriate because the actual innocence exception does permit a habeas court to review the merits of a constitutional claim, notwithstanding that the claim is abusive, successive, or otherwise procedurally barred." *Reasonover v. Washington*, 60 F. Supp. 2d 937, 947 (E.D. Mo. 1999). In *Schlup*, this Court deliberately eschewed any such due diligence requirement:

> To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—*that was not presented at trial*.

513 U.S. at 324 (emphasis added). As the *Schlup* Court elaborated, the "actual innocence" standard allows the reviewing court "to consider the probative force of relevant evidence that was *either excluded or unavailable at trial*." *Id.* at 327-28 (emphasis added). Thus, the habeas court must make its determination concerning petitioner's innocence "in light of

all the evidence, including that alleged to have been illegally admitted . . . and evidence tenably claimed to have been *wrongly excluded* or to have become available only after the trial." *Id.* at 328 (emphasis added) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)); *accord Bousley v. United States*, 523 U.S. 614, 623 (1998); *see also Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.17 (1986).

The court below rewrote *Schlup* to allow federal habeas courts to consider only evidence that was not available at trial. Such a limitation simply interposes another layer of procedural default analysis, requiring prisoners, in essence, to show "cause" before their new evidence of innocence may be heard. The imposition of this new hurdle to actual innocence claims cannot be squared with the fact that the *Schlup* standard was designed as a final backstop for innocent prisoners who could not show "cause and prejudice" for their procedural defaults. *See Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring) ("The operative test is cause and prejudice; there is a kind of 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause."). The Eighth Circuit's standard strips the miscarriage of justice exception of any power to protect a petitioner who can actually show that no reasonable juror would have convicted him "in the light of the new evidence." *Schlup*, 513 U.S. at 327. In almost all procedural default cases, prisoners in the Eighth Circuit with compelling evidence of their innocence will be unable to present that evidence to a federal habeas court. *See Reasonover*, 60 F. Supp. 2d at 949 & n.8 (explaining how the Eighth Circuit's standard would effectively nullify claims of actual innocence, particularly in ineffective assistance of counsel cases). Yet this Court plainly intended the "actual innocence" exception to capture cases like this one, when procedural default doctrine does not adequately account for a state prisoner who may very well be innocent.

Not only is the court of appeals' due diligence requirement inconsistent with the legal standard established in *Schlup*, but it

is inconsistent with the outcome in *Schlup* as well. In remanding the case for further proceedings on Schlup's actual innocence claim, the Court relied upon new evidence that was readily available to trial counsel, including statements from two witnesses, one who had actually testified at trial, and another who had been available to testify if he had been contacted. *Schlup*, 513 U.S. at 310 n.21, 312 n.25. A "due diligence" standard would have barred consideration of that evidence. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 347-48 (1992) (considering whether petitioner's medical records constituted evidence of "actual innocence of the death penalty" without imposing a "due diligence" threshold requirement).

Thus, a claim of actual innocence may be based on "reliable evidence not presented at trial," *Calderon v. Thompson*, 523 U.S. 538, 559 (1998)—whatever the reason it was not presented. *See also id.* at 573 (Souter, J., dissenting) (actual innocence standard is met with "a demonstration of innocence by evidence 'not presented at trial,' even if it had been discovered, let alone discoverable but unknown, that far back") (citation omitted). The question, in other words, is not whether the evidence is new to the defendant, but whether it is new to the jury.

B. The court of appeals held, in the alternative, that "[e]ven assuming the alibi testimony was new evidence, Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi." J.A. 235. But if the statements of Gladys Edwards, James Edwards, Laura Lee, and Reginald Rhodes are true, then no jury would have voted to convict. *See Schlup*, 513 U.S. at 331. These are not new witnesses that have come forward only at the eleventh hour. Lee has been attempting to present his alibi defense in every available forum since his trial, and he complained about his lawyer's failure to call Rhodes as a defense witness as early as his sentencing hearing. J.A. 35-39.

The evidence that the jury never heard in this case "call[s] into question the credibility of the witnesses presented at trial,"

thereby requiring the district court "to make some credibility assessments." *Schlup*, 513 U.S. at 330. The court of appeals could not conduct the "probabilistic inquiry" as to whether "in light of the new evidence, no juror, acting reasonably," would have voted to convict, *id.* at 329-30, without first requiring the district court to conduct an evidentiary hearing to evaluate the credibility of these witnesses. The court of appeals was not entitled to preempt that evaluation by holding as a matter of law that reasonable jurors necessarily would have accepted the less than airtight testimony of the state's witnesses over that of Lee's family members and his co-defendant. Even if both sets of witnesses appear equally believable, then Lee has met the *Schlup* standard, for no reasonable juror, confronted with seemingly credible eyewitness testimony that the defendant committed a crime and equally credible testimony from alibi witnesses that the defendant was out of state when the crime was committed, would have found the defendant guilty beyond a reasonable doubt.

Accordingly, if this Court finds that Lee's due process claim is procedurally defaulted, it should remand for an evidentiary hearing to determine whether Lee made the requisite showing of "actual innocence" to warrant consideration of his due process claim.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court reverse the decision of the court of appeals.

Respectfully submitted,

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MAY 2001

APPENDIX

APPENDIX A

28 U.S.C. § 2254(e)(2) provides as follows:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

APPENDIX B

The pertinent Missouri Supreme Court Rules in effect in 1994 are as follows:

RULE 24.09 MISDEMEANORS OR FELONIES—APPLICATION FOR CONTINUANCE—HOW MADE

An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally.

(Adopted June 13, 1979, effective Jan. 1, 1980)

RULE 24.10 MISDEMEANORS OR FELONIES—APPLICATION FOR A CONTINUANCE ON ACCOUNT OF ABSENCE OF WITNESSES SHALL SHOW WHAT

An application for a continuance on account of the absence of witnesses or their evidence shall show:

(a) The facts showing the materiality of the evidence sought to be obtained and due diligence upon the part of the applicant to obtain such witness or testimony;

(b) The name and residence of such witness, if known, or, if not known, the use of diligence to obtain the same, and also facts showing reasonable grounds for belief that the attendance or testimony of such witness will be procured within a reasonable time;

(c) What particular facts the affiant believes the witness will prove, and that he knows of no other person whose evidence or attendance he could have procured at the trial, by whom he can prove or so fully prove the same facts;

(d) That such witness is not absent by the connivance, consent, or procurement of the applicant, and such application is not made for vexation or delay, but in good faith for the purpose of obtaining a fair and impartial trial.

If the court shall be of the opinion that the affidavit is insufficient it shall permit it to be amended.

(Adopted June 13, 1979, effective Jan. 1, 1980)

RULE 29.15 CONVICTION AFTER TRIAL—CORRECTION

(a) Nature of Remedy—Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violate the constitution and laws of this state or the constitution of the United States, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure before the trial court is governed by the Rules of Civil Procedure insofar as applicable.

(b) Form of Motion—Time to File—Cost Deposit Not Required—Notice of Filing, to Whom—Failure to File, Effect of. A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form 40. If an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal pursuant to Rule 30.04. If no appeal of such judgment was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections. No cost deposit shall be required. Movant shall give notice of the filing of the motion to any court in which the appeal of the judgment of conviction is pending. Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15.

(c) Clerk's Duties. Movant shall file his motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion the clerk shall notify the sentencing judge.

(d) Contents of Motion. The motion to vacate shall include every ground known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion.

(e) Pro Se Motion—Appointment of Counsel—Amended Motion, Required When—Withdrawal of Appointed Counsel. When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the grounds are asserted in the motion and whether the movant has included all grounds known to him as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all grounds known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and grounds. For good cause shown, appointed counsel may be permitted to withdraw. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed.

(f) Amended Motion—Form, Time for Filing—Response by Prosecutor. Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within ten days after the date an amended motion is required to be filed.

(g) Request for Hearing, Time for Filing—Hearing, Not Required, When—Time Hearing to Be Held. A request for a hearing shall be made by motion on or before the date an amended motion is required to be filed. Within fifteen days after the date an amended motion is required to be filed, the court shall determine whether to grant a hearing. If no request for hearing is timely filed or if the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. If a hearing is ordered, it shall be held within sixty days of the date of the order granting a hearing.

(h) Presence of Movant—Record of Hearing—Continuance of Hearing—Burden of Proof. At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving his grounds for relief by a preponderance of the evidence.

(i) Findings and Conclusions, Issued, When—Judgment. The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held, within thirty days of the submission of the case. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence him or order a new trial or correct the judgment and sentence as appropriate.

(j) Appeal—Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering same. If the sentencing court finds against the movant on the issue of indigency and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigency so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(k) Successive Motions. The circuit court shall not entertain successive motions.

(l) Effect of Motion on Pending Appeal—Consolidation of Appeals. If a motion is filed under this Rule 29.15 and an appeal is pending from the judgment of conviction that is the subject of the motion, the appeal shall be suspended until final determination of the issues raised by the motion. Appellant shall give notice to the court where the appeal is pending of the entry of judgment on the motion filed under this Rule 29.15 within ten days of the entry of the judgment. If an appeal is filed from the judgment sustaining or overruling a motion filed under the provisions of this Rule 29.15, the appeal from the judgment of conviction shall be consolidated with the appeal from the judgment on the motion. The record on appeal shall consist of the transcript and legal file from both the judgment of conviction and the judgment on the motion. If a claim of ineffective assistance of counsel was presented in the motion, the attorney representing movant on the motion filed pursuant to this Rule 29.15 shall be the attorney on appeal for the consolidated case.

(m) Schedule. This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1988. If sentence is pronounced prior to January 1, 1988, and no prior motion has been filed pursuant to Rule 27.26, a motion under this Rule 29.15 may be filed on or before June 30, 1988. Failure to file a motion on or before June 30, 1988, shall constitute a complete waiver of the right to proceed under this Rule 29.15. If a sentence is pronounced prior to January 1, 1988, and a prior motion under Rule 27.26 is pending, post-conviction relief shall continue to be governed by the provisions of Rule 27.26 in effect on the date the motion was filed.

(Added Feb. 11, 1987, effective Jan. 1, 1988. Amended May 23, 1987, effective Jan. 1, 1988.)

APPENDIX C

[Filed July 13, 1995]

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CV94-28462
Division 3

REMON LEE,
Movant,

v.

STATE OF MISSOURI,
Respondent.

RESPONSE IN OPPOSITION TO MOVANT'S *PRO SE* MOTION AND FIRST AMENDED MOTION TO VACATE, SET ASIDE OR CORRECT THE JUDGMENT OR SENTENCE PURSUANT TO RULE 29.15

COMES NOW the State of Missouri, by and through Linda Koch, Assistant Prosecuting Attorney, and offers the following suggestions and points of authority in response to movant's *pro se* motion and first amended motion for post-conviction relief:

1. On February 24th, 1994, a jury found Movant guilty of Count I Murder in the first degree, and Count II Armed Criminal Action, in Case Number CR93-0453. The April 19, 1994 sentencing imposed Count I, life without parole and Count II, 10 years concurrent, in case number CR93-0453.

2. On April 19, 1994, the Honorable Anthony P. Nugent, Senior Judge, sentanced Movant to concurrent terms of life

without parole on the count of murder and ten (10) years imprisonment on the count of armed criminal action.

3. Movant filed an appeal with the Missouri Court of Appeals, Western District, on November 21, 1994. Movant's record on appeal was stayed pending the result of the 29.15 proceeding.

4. Movant entered into custody at Potosi Correctional Center, Mineral Point Missouri on May 31, 1994.

5. Movant filed his *pro se* motion pursuant to Rule 29.15 on November 17, 1995.

6. The following are Movant's alleged grounds in support of his *pro se* and first amended Rule 29.15 motion for deprivation of effective assistance of counsel during trial, and the State's responses:

7. Movant was represented at trial by Mr James McMullin.

Movant alleges he was denied his constitutional rights due to the fact that he received "ineffective assistance of counsel". His allegations contained in his *pro se* motion and first amended motion are as follows:

I. Pro Se Motion

In Movant Pro Se Motion he claims that he received ineffective assistance of counsel because counsel did not submit an alibi instruction nor did counsel move to modify the instructions to include MAI-CR3d 308.04 (1987) or MAI-CR 3d 308.06 (1987).

II. First Amended Motion

Movant alleges in his First Amended Motion that his attorney was ineffective because:

1) he failed to present evidence in his defense and to due process of the law because his alibi witnesses left the courthouse without testifying;

2) that he was denied due process of law because an "unknown person in the prosecutor's office told Movant's alibi witnesses they could leave, and he was unfairly denied a continuance upon learning this;

3) that his attorney failed to adequately consult hims about his right ot testify on his own behalf;

4&5) that his trial counsel failed to object to State's instruction number six; that his trial counsel failed to investigate and/or ask for a continuance to investigate or to object to the testimony of Rhonda Shelby;

6) that his attorney was ineffective in that he did not submit an alibi instruction.

GENERAL LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL

To maintain an ineffective assistance of counsel claim, the petitioner must satisfy a two pronged test. First, movant must show that the attorney's conduct did not conform to the care and skill of a reasonably competent lawyer rendering similar services under existing circumstances. If the Court finds that the attorney's conduct did not so conform, then the movant must further show that his conduct thereby prejudiced him. *Seales v. State*, 500 S.W.2d 733,737 (Mo. banc 1979); *Strickland v. Washington*, 466 U.S. 688, 104 5. Ct. 2052, 80 L. Ed. 2d. 6674 (1984); *Wilson v. State*, 626 S.W.2d 243 (Mo. banc 1982).

The burden upon Movant to show ineffective assistance of counsel is a heavy one. *Murphy v. State*, 636 S.W.2d 699,702 (Mo. App. 1982). Further, in connection with an allegation of ineffective assistance of counsel, counsel is presumptiveiy

competent. *Campbell v. State*, 660 S.W.2d 721, 722 (Mo. App. 1983).

MOVANT'S PRO SE MOTION

In Movant Pro Se Motion he claims that he received ineffective assistance of counsel because counsel did not submit an alibi instruction nor did counsel move to modify the instructions to include MAI-CR3d 308.04 (1987) or MAI-CR 3d 308.06 (1987).

This claim has absolutely no merit because there was no evidence of alibi adduced at trial. (See Trial Transcript, "Defendant's Evidence, pgs. 491-589).

MOVANT'S FIRST AMENDED MOTION

1. Movant's first allegation of ineffective assistance of counsel is that his attorney was ineffective because Movant's alibi witnesses left the courthouse without testifying. This is not a cognizable claim because there is no cause or effect relationship stated by Movant as to how his attorney was connected with his witnesses leaving.

2. Movant claims in his next allegation that someone from the State told his alibi witnesses that they could leave the third day of trial when they were waiting to testify. No one from the State had contact with these witnesses except Det. Garry Wantland who interviewed them about what they would testify to at trial. This happened in the evening of the first day of the trial. No one else from the State spoke to defense witnesses. Defense witnesses, who were defendant's mother, his stepfather and his sister, had been flown in from California the evening before trial by Mr. McMullen. (See Trial Transcript, pgs. 573-582) They knew who defendant's attorney was. Even if they would have left because someone from the prosecutor's office told them to, it does not make sense that they would have listened to someone from the

prosecutor's office, and not made an inquiry of defendant's attorney.

This is a bare conclusion and is not a factual allegation that can even be proven to be true; therefore, it is not a proper post conviction claim. *Kelly v. State*, 796 S.W.. 2d 658 (Mo. App. 1990).

3. Movant claims that counsel inadequately consulted with him about his right to testify on his own behalf at trial. This claim can be refuted by the record as Movant's attorney went over his right to testify or to not testify on the record with Movant. (Trial Transcript, pgs. 34-35, line 1-9, and pgs. 573-579).

4. Movant claims in his third allegation of ineffective assistance of counsel that his attorney did not object to the giving of Instruction No. 6 which does not require the jury to find that Movant deliberated. Instruction number 6 or MAI-CR3d 313.02 modified by 304.04 was the proper instruction in effect at the time of the trial, February 22nd, 1994. This instruction was later changed, but the effective date of the change was October 1st, 1994, eight months after the trial of this case. Since the Court is required to give the MAI-CR3d instructions, any objection Mr. McMullen would have made would have been meritless.

Allegations of instructional error are beyond the scope of a motion for post conviction relief and are matters for direct appeal. *State v. Shurn* 866 S.W. 2d (Mo. banc 1993). *Richardson v. State* 773 S.W.2d 858 (Mo. App. 1989). *Battle v. State* 745 S.W.2d 730 (Mo. App.1987). *Henderson v. State* 789 S.W.2d 498 (Mo. App. 1990).

In determining whether counsel gives ineffective assistance to his client on the law, the attorney's conduct is measured by what the law is considered at the time of trial. Counsel is not ineffective for not anticipating change in the law. *Hawkins v.*

State, 843 S.W.2d 606 (Mo. App. 1993). See also *State v. Cunningham*. 863 S.W.2d 914 (Mo. App. 1993).

5.& 6 Movant, in his fifth and sixth allegations in his first amended motion claims that trial counsel failed to ask for a continuance or conduct more investigation on a witness, Rhonda Shelby and failed to object and request a mistrial at the testimony of Rhonda Shelby.

Defense counsel had the police report which contained Rhonda Shelby's name and her interview with the police about what she knew about the case. Ms. Shelby's testimony amounted to the fact that she knows the defendant and had seen the defendant at her apartment complex the night before her brother's murder, and he had been looking for the victim. Mr. McMullin did an adequate job cross-examining this witness, and defendant has failed to State how Mr. McMullins' "lack of investigation" has prejudiced him. "Counsel has a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. *Sanders v. State*. 738 S.W.2d 856, 858 (Mo. banc 1987)." *Evans v. State*, 759 S.W.2d 858 (Mo. App. 1988).

As Ms. Shelby was an endorsed witness, the objection to her testimony clearly would have been without merit, as would a motion for mistrial. It cannot be said that such a motion would have had a lot of merit, and counsel is not required to make an objection that is without merit. *State v. Settle*. 670 S.W.2d 7 (Mo. App. 1984). In fact, the mere fact that a meritorious objection is not made, whether by design or accident is not basis for ineffective assistance of counsel. There must be an overall showing that counsel's performance fell short of established norms and that the incompetence effected the result. *Jones v. State*. 784 S.W.2d 789 (Mo. banc 1990). Even if he had made his objection, it would not have affected the outcome of the trial. *State v. Bryant*, 658 S.W.2d

935 (Mo. App. 1983); *State v. Wynn*. 666 S.W.2d 663 (Mo. App. 1984). Therefore these points must be denied.

WHEREFORE, the State respectfully requests this Court to dismiss Movant's Rule 29. 15 Motion without a hearing, as all Movant's claims can be refuted from the record or by law.

Respectfully Submitted,

/s/ Linda Koch
LINDA KOCH (36849)
Assistant Prosecuting Attorney

Supreme Court, U.S.
FILED
JUL 11 2001
OFFICE OF THE CLERK

00-6933

IN THE
SUPREME COURT OF THE UNITED STATES

REMON LEE,

Petitioner,

vs.

MICHAEL KEMNA,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the state trial court violate petitioner's due process rights by not granting a continuance during a criminal trial because of the disappearance of three defense witnesses, when the trial court was not told why the witnesses left nor given any reasonable assurances that they could be found promptly and would testify?

2. Should the district court have granted an evidentiary hearing to consider the explanations of alibi witnesses for why they left the courthouse prior to testifying, when no explanations were offered to the trial court in the motion for new trial, or at a hearing weeks after trial?

3. Is a due process challenge to the denial of a motion for continuance, based on the unexplained disappearance of defense witnesses during trial, procedurally barred from federal habeas corpus review by the opinion of the Missouri Court of Appeals which rejected the claim for the three independent reasons that: 1) the motion was not in writing as required by Missouri Supreme Court Rule 24.09, 2) the oral motion did not set out the information required by Missouri Supreme Court Rule 24.10 in the case of absent witnesses, and 3) no prejudice from the motion's denial was demonstrated and, if so, should that default be excused when Lee's allegation of "cause" was not responsible for the default and was, itself, separately defaulted, and Lee's showing of "actual prejudice" fell short of any applicable standard?

4. Is there a sufficient showing of actual innocence to remove a procedural default when the current assertions of three family members of a criminal defendant that he was out-of-state at the time of the murder are contradicted by four witnesses who did testify at trial?

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Argument 16

I. Lee's claim that his due process rights were violated by the denial of his oral motion for continuance may not be reviewed by a federal court because it was rejected by the Missouri Court of Appeals on independent and adequate state grounds. 16

   A. The adequate and independent state ground doctrine, jurisdictional in some contexts, serves important policies of comity and federalism in the context of federal habeas review 17

   B. A state ground is "adequate" for purposes of enforcing a procedural default if it is firmly established and regularly enforced at the time of the petitioner's default, and if the ground asserted is rationally related to a legitimate state interest. 19

      1. "Adequate" state grounds are firmly established and regularly enforced. 20

      2. "Adequate" state grounds are rationally related to a legitimate state interest. 22

C. Missouri procedural rules relating to motions for continuance were firmly established decades before Lee's trial, and the rules governing appellate review of the denial of motions that did not comply with those rules have been enforced without exception. 23

1. The state ground at issue was firmly established, even in cases of exigency, regardless of whether Lee's precise fact situation had ever been litigated before. 25

2. The state ground at issue is regularly enforced even though appellate courts may cite other grounds in affirming a denial of a non-conforming motion. 28

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STATEMENT OF THE CASE

On August 27, 1992, in Kansas City, Missouri, Remon Lee waited in his car while Reginald Rhodes shot Steve Shelby several times in the head and neck, killing him. Rhodes then got into Lee's getaway car, and Lee sped away from the scene (JA 124-25). Rhodes pled guilty to the killing (JA 37-38). Lee was tried before a jury, was convicted of first degree murder (JA 42-43), and was sentenced to concurrent terms of life imprisonment without the possibility of parole and ten years' imprisonment for first degree murder, §565.020, RSMo Supp. 1992, and armed criminal action, §571.015, RSMo 1986 (JA 34).

1. State Trial Court Proceedings

During Lee's trial, two eyewitnesses testified that Lee was the getaway driver (JA 124-125). Two other eyewitnesses put Lee in Kansas City on the night before the murder, in the company of the shooter Rhodes, and looking for the victim Shelby (T.Tr. 450-453, 471-474).

On the morning of February 24, 1994, the last day of Lee's three-day trial, the state rested and the defense began its case. Following the lunch recess, defense counsel requested a continuance because Lee's three would-be alibi witnesses -- Lee's mother, sister and stepfather -- could not be found (JA 20, 24). Lee told the court he had seen them at 8:30 a.m. that morning and at one subsequent recess; his attorney stated that the witnesses apparently had left the courthouse at around 11:00 a.m. (JA 17).

No explanation was offered to the court for the witnesses' disappearance, no proffer was made as to their likely testimony, and no assurance was given the court that the witnesses would be located or produced, though Lee said he did not think they had left Kansas City because they had planned to attend a religious service that evening. The trial court indicated it would have to deny the continuance because

it appeared to the court that the witnesses had in effect abandoned Lee (JA 22). Lee's counsel agreed that "[i]t looks like that judge" but stated that he could neither confirm nor deny that the witnesses had abandoned his client (JA 22).

The trial judge also mentioned that on the next day, Friday, he would be at the hospital with his daughter all day and thus could not try the case that day, and that he had another trial scheduled to start the following Monday (JA 22).

On March 11, 1994, more than two weeks after Lee's oral request for a continuance was made and denied, Lee filed a motion for new trial in the trial court (JA 28). He argued that the trial court erred in not granting Lee a one-day continuance to locate his would-be alibi witnesses whom the motion alleged were discovered missing from the witness room by counsel at 11:00 a.m. on February 24, 1994 (JA 31--32). Even two weeks removed from trial, however, Lee's motion offered no explanation why the witnesses left, nor any assurance that the witnesses would have returned to testify had a continuance been granted (JA 31-32). Lee never argued to the trial court, either at trial or in his motion for new trial, that the denial of his oral motion for continuance violated the United States Constitution (JA 20-25, 31-32).

On April 19, 1994, the trial court convened a hearing to consider Lee's motion for new trial, to impose sentence, and, as required by Missouri Supreme Court Rule 29.07, to consider whether there was probable cause to believe trial counsel had been ineffective (JA 33-41). Lee's counsel stood on his argument in the written new trial motion and added no further information or argument to support the motion, and Lee's new trial motion was denied (R.8 (S.Tr. 2, 5)) (JA 42). At this hearing, Lee mentioned nothing about his alibi witnesses and provided no explanation for their disappearance (JA 33). Trial counsel stated in Lee's presence that Lee's alibi witnesses left before testifying and returned to California, and Lee neither disagreed nor offered any explanation for their leaving (JA 37).

2. State Post-Conviction Relief Proceedings

On November 17, 1994, Lee filed a *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15 (JA 45-54). Lee alleged that his trial counsel was ineffective for not requesting an alibi instruction (JA 46-50). Lee did not even acknowledge that his would-be alibi witnesses did not testify, let alone offer any explanation for why those witnesses left the courthouse (JA 46-50). Lee never mentions, let alone ascribes error to, the trial court's denial of Lee's oral motion for a continuance even though Lee acknowledged under oath that he had included all known grounds for vacating the conviction (JA 52).

On July 13, 1995, court-appointed post-conviction counsel filed an amended motion. Only then, more than seventeen months after Lee's oral motion for continuance was made and denied, did Lee claim for the first time that his constitutional rights were violated when an unknown person believed to be working for the prosecutor told his would-be alibi witnesses they could leave (JA 57-59). Thus, the first version of Lee's "someone official told my witnesses they could leave" story was born. In it, Lee maintained that his would-be alibi witnesses were told that their testimony would not be needed at all -- not that they should come back the next day due to the length of the prosecution's case -- and that his relatives retired to another relative's house to await the jury's verdict (JA 57-59). Lee verified the correctness of this information under oath as well (JA 64).

Lee alleged, first, that the denial of his oral motion for continuance violated his due process rights and, second, that his counsel's failure to produce Lee's would-be alibi witnesses despite their disappearance rendered counsel constitutionally ineffective (JA 57-60). The prosecutor responded that no one from the state had spoken with these would-be alibi witnesses other than a detective who had interviewed them on the first day of trial. The prosecutor further pointed out that it was not credible that Lee's

would-be alibi witnesses would leave without consulting the defendant or defense counsel, regardless of who else had spoken to them (Addendum to Appellant's Brief 12a-13a).

The post-conviction review court rejected Lee's due process claim as a claim of trial error cognizable only in Lee's direct appeal, and rejected Lee's ineffective assistance of counsel claim because Lee's counsel was not (and could not be) blamed for the disappearance of Lee's would-be alibi witnesses (JA 69-70).

3. Consolidated Appeal to the Missouri Court of Appeals

Lee, through counsel, briefed a consolidated direct appeal of his conviction and sentence and an appeal of the denial of his motion for post-conviction relief in the Missouri Court of Appeals, Western District (JA 80).

a. Lee's Direct Appeal

In Lee's direct appeal argument challenging the denial of his oral motion for continuance, Lee offered no explanation for the disappearance of his would-be alibi witnesses (JA 90-95). Despite a perfunctory reference to the Due Process Clause of the Fourteenth Amendment to the United States Constitution in the Point Relied On, Lee offered no argument specifically as to how the United States Constitution had been violated, nor did he cite even a single federal case on this issue (JA 90-95).

The State of Missouri argued that the request for continuance did not comply with Missouri Supreme Court Rule 24.10 in that it did not show the materiality of the witnesses' testimony, did not show that the testimony could be obtained in a reasonable time, and was not supported by testimony from Lee that the witnesses' absence was not attributable to him (JA 110-115). The State also argued that, in order to show an abuse of discretion under Missouri law,

Lee was required to show that, had he been granted the continuance, a reasonable probability existed that the outcome of the trial would have been different, which Lee had not and could not show (JA 114-115).

The Missouri Court of Appeals affirmed and gave three independent state law reasons why the trial court's denial of Lee's motion for continuance was proper. First, the court held that the mere fact that Lee's motion for continuance was oral -- and not in writing as required by Supreme Court Rule 24.09 -- was, by itself, adequate basis to deny the motion (JA 126-127). Second, even assuming that an oral motion was sufficient under the circumstances, the Missouri Court of Appeals held that Lee's oral motion was deficient because it did not contain the factual showing required by Missouri Supreme Court Rule 24.10 for a motion for continuance based on an absent witness (JA 127-128).[1] Finally, the Missouri Court of Appeals held that a trial court's failure to grant even a proper motion for continuance is reversible error only if prejudicial, and Lee could not show his would-be alibi witnesses would have created a reasonable probability of an acquittal (JA 128).

b. Lee's Post-Conviction Relief Appeal

In the portion of Lee's consolidated brief challenging the denial of his post-conviction relief motion, Lee alleged that his trial counsel was ineffective because his would-be alibi witnesses had left the courthouse when they were told, by an unknown person believed to be working for the prosecutor, that their testimony was not needed (JA 96-101).

The State of Missouri argued that Lee did not allege any particular deficiency on the part of counsel in connection with the disappearance of his witnesses or the denial of his

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[1]Missouri Supreme Court Rules 24.09 and 24.10 are set forth in full in the Appendix to Petitioner's Brief at 1a-8a.

oral motion for continuance, and that this claim was merely an improper attempt to relitigate the due process claim raised in his direct appeal (JA 119-120).

The Missouri Court of Appeals affirmed the denial of Lee's motion for post-conviction relief under Rule 29.15. The court held, in relevant part, that Lee had wholly failed to allege or prove that the disappearance of his would-be alibi witnesses was in any way the fault of Lee's trial counsel. Thus, the Court concluded, the disappearance of these individuals could not be the basis for an ineffective assistance of counsel claim (JA 131).

4. Habeas Corpus Proceedings

a. United States District Court

On January 16, 1998, Lee filed a habeas corpus petition in the United States District Court for the Western District of Missouri (JA 132). For the first time, Lee alleged that the prosecutor tricked Lee's would-be alibi witnesses into leaving by having a court officer tell the witnesses they would not be needed until the following day, and then rushing the case to completion so there would be no following day of trial (JA 154-156). Lee alleged that, by presenting a list of twenty-three witnesses, the prosecutor led the witnesses to believe that the state's case would take up the rest of the day, and then sent a court officer to tell the witnesses they would not be needed until the next day (JA 137).

Gone without a trace was the earlier version of this story offered at the post-conviction relief stage in which an "unknown person, believed to be working for the prosecutor," told the witnesses their testimony would not be needed at all and thus they had gone to a relative's house to await the verdict (the "PCR Version"). Gone also was the version presented at the new trial/sentencing hearing in which the witnesses simply left and returned to California without explanation (the "Trial Court Version") (JA 37-41, 57-59).

This "the prosecutor tricked my witnesses into leaving and coming back tomorrow" version (the "Habeas Version") formed Lee's basis for his habeas claims that the prosecutor had engaged in misconduct (Ground Three), and that the trial court's denial of Lee's oral motion for a continuance violated his due process rights (Ground Six) (JA 157).

The prison superintendent's response to the prosecutorial misconduct claim pointed out that Lee was procedurally barred from asserting this claim in his habeas petition because it was not presented in his new trial motion or in his consolidated state court appeal (JA 185). The superintendent also argued that this claim was without merit because the record unambiguously demonstrates that the state rested its case at 10:00 a.m. on the morning of February 23, 1994, one hour prior to the time Lee's counsel told the court that Lee's would-be alibi witnesses left the courthouse (JA 186). Thus, the record contradicts Lee's allegation that his would-be alibi witnesses left prior to the close of the state's case because they believed or were told that the state's case would consume the remainder of the day (JA 186).

With respect to Lee's claim that denial of his oral motion for continuance violated his due process rights (Ground Six), the superintendent responded that Lee had failed to adequately raise this claim in state court. Even though he made a perfunctory reference to the United States Constitution in his Point Relied On, Lee failed to advance a specific federal constitutional law theory in the direct appeal argument portion of his brief as required by state law. Moreover, the superintendent argued that Lee's due process claim was procedurally defaulted because the Missouri Court of Appeals affirmed the denial of Lee's motion for continuance not on federal constitutional grounds, but on the independent and adequate state grounds that Lee's motion did not comply with Missouri Supreme Court Rule 24.10, which sets out the information that must be provided in a request for a continuance due to an absent witness (JA 187-188). Finally, the superintendent argued that Lee's due process claim was

substantively without merit because due process does not require a continuance on the basis of the facts as they had been presented to the trial court judge at the time the motion was made and denied (JA 188-189).

In support of his claims, Lee offered the district court affidavits from his three would-be alibi witnesses (JA 163-174). Each affidavit stated that Lee was in California from July to October 1994, and that, while the witnesses were waiting to testify at Lee's trial, they left because they were told their testimony would not be needed until the following day (JA 168-174). One of the affidavits stated that the witnesses had been told this by "those people in Missouri" (JA 169); the other two affidavits called the individual a court officer (JA 170-174). The superintendent argued that the affidavits should not be considered because these would-be alibi witnesses -- members of Lee's family -- could have given this information to Lee and his counsel immediately after trial, in plenty of time to have this information presented to the trial court in the new trial motion, in Lee's direct appeal as a prosecutorial misconduct claim, or in Lee's post-conviction relief motion as an ineffective assistance of counsel claim (JA 209-210).

The district court declined to consider these affidavits because Lee had failed to present them in a timely manner to the appropriate state court, despite this evidence being readily available to Lee and his counsel almost from the moment Lee's relatives walked away from Lee's trial. In addition, the district court held that the affidavits did not demonstrate by clear and convincing evidence that Lee was innocent of the offense charged, or that no reasonable juror would have convicted Lee had they been exposed to these would-be alibi witnesses (JA 215-216).

The district court held that Lee's prosecutorial misconduct claim (Ground Three) was procedurally defaulted due to Lee's failure to raise this claim in his motion for new trial or on direct appeal (JA 213-16). The district court also held that Lee's due process claim (Ground Six) was

procedurally defaulted because the Missouri Court of Appeals rested its decision on the state law grounds that Lee's motion for continuance was not in writing and was not supported by the factual showing required by Rule 24.10. Finally, the district court noted that the Missouri Court of Appeals had held that, even if Lee's motion had been properly presented and properly supported, there was no substantial prejudice to Lee because, even had the would-be alibi witnesses testified, it was not reasonably probable that a different outcome would have resulted (JA 216-217). The district court refused to grant a certificate of appealability (JA 231).

b. United States Court of Appeals

The United States Court of Appeals for the Eighth Circuit granted a certificate of appealability limited to the single issue of "whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance" (JA 232). The court affirmed the district court's decision on the basis that the Missouri Court of Appeals decision was based on independent and adequate state grounds (JA 233-235). The court below also rejected Lee's claim that counsel's failure to comply with these rules was cause to excuse his default, because Lee never made an independent Sixth Amendment claim on this basis in state court (JA 234-235). Finally, the court below found that Lee could not meet the gateway actual innocence test for review (JA 235).

Lee's motion for rehearing or for rehearing *en banc* was denied on August 8, 2000, two judges dissenting. On February 26, 2001, this Court granted Lee's *pro se* petition for writ of certiorari.

SUMMARY OF ARGUMENT

This case is about federalism. The Missouri Court of Appeals did not reach Lee's due process claim because Lee failed to comply with well established and regularly enforced procedural rules for presenting his motion for continuance. There is no suggestion that these rules were interposed as a pretext to mask the Missouri courts' unwillingness to enforce Lee's constitutional rights. Rather, Missouri simply insisted -- as states must be able to do -- that criminal defendants give it the first chance to correct constitutional errors, and that they do so consistent with legitimate procedural rules. Since its inception, this Court has recognized states' rights to do this by enforcing the "adequate and independent state ground" doctrine.

Lee's arguments now threaten the allocation of power represented by two centuries of this Court's application of that doctrine. Lee would turn the "adequacy" element of that doctrine, which historically has served only the purpose of exposing subterfuges designed to frustrate federal review, into a free-form fairness test evaluating the state's application of procedural rules to each defendant's circumstances. Such a case-by-case balancing of state and federal interests ignores the balance already struck by the "independent and adequate state ground" doctrine. If this Court pursues the radical change of direction advocated by Lee, it will put the states in an intolerable position. States will be forced to choose between enforcing their procedural rules and inviting *de novo* review of federal claims years later in federal habeas proceedings, or abdicating control over their criminal procedures by resolving even improperly presented federal claims in order to avail themselves of the presumption of correctness in 28 U.S.C. § 2254(d). States should not have to make that choice.

If this Court declines to adopt the overhaul of the "adequate and independent state ground" doctrine that Lee suggests, and applies the law as it has been well established, Lee cannot prevail. The district court and the court below

found that Lee had defaulted his constitutional claims and no federal review was permitted. No one, including the dissent below, has found a basis to excuse Lee's default under either a "cause and actual prejudice" analysis, or by application of the gateway to review for probable actual innocence. Accordingly, the decision of the court below should be affirmed.

1. Lee's Procedural Default Bars Review of His Sole Remaining Claim

The court below limited Lee's certificate of appealability to the single issue of whether Lee's due process rights were violated when the state trial court refused to grant a continuance to locate his would-be alibi witnesses who had left the courthouse after the defense had begun to present its case. That issue, Ground Six of Lee's habeas petition, is the only claim to survive for review by this Court.

Lee asserted no due process claim to the trial court at the time his oral motion for a continuance was made and denied, nor did he claim a denial of due process in his new trial motion filed two weeks later. Lee made no specific federal constitutional argument on direct appeal regarding the denial of his continuance, other than a perfunctory reference to the United States Constitution in his Point Relied On, and cited no federal cases on this issue.

The Missouri Court of Appeals affirmed the trial court's denial of a continuance without reference to the United States Constitution or federal law. Rather, it affirmed by invoking the following state ground for its decision in this case: A Missouri appellate court will not reverse the denial of a motion for continuance if the motion either was not presented in writing as required by Missouri Supreme Court Rule 24.09 or was not supported by an adequate factual showing as required by Missouri Supreme Court Rule 24.10. Lee points to no decision in which a Missouri appellate court ever reversed a trial court's denial of a continuance in which the underlying motion had failed to comply with Rules 24.09

or 24.10. Thus, this ground has been firmly established and regularly enforced. This rule is rationally related to the legitimate state interests of: (i) encouraging litigants to place before trial courts information that is sufficiently adequate and reliable to permit a trial court to make a well-reasoned decision on a motion to grant continuance, and (ii) requiring the creation of a record permitting more accurate appellate review of trial court decisions. Accordingly, this rule is an adequate state law ground on which to enforce Lee's procedural bar.

2. The Procedural Bar to Review of Lee's Claim Cannot be Excused

Lee claims that he has shown "cause" sufficient to excuse his default because he alleges that someone official tricked his would-be alibi witnesses into leaving the courthouse before they could testify. But nothing his would-be alibi witnesses did or were told caused Lee to ignore completely the long-standing Supreme Court rules governing motions for continuance. Counsel's compliance with these rules was still practicable, and still would have served a legitimate state interest as the present litigation demonstrates. Moreover, Lee never presented this allegation of cause to any Missouri court having an opportunity to address such an allegation consistent with Missouri procedural rules. Finally, to the extent Lee now suggests that prosecutorial misconduct was "cause" for his default (which would fail for the same lack of causal relationship just described), Lee should not be permitted to assert a "cause" that was not separately preserved as a constitutional claim in state court and the district court has already found that Lee's prosecutorial misconduct claim was defaulted.

Not only has Lee failed to show "cause," he cannot show "actual prejudice." Three family members offering an alibi that is flatly contradicted by four of the state's witnesses, including two eyewitnesses to the murder who testified that

Lee drove the getaway car, cannot be sufficient to meet that standard. The Missouri Court of Appeals, applying a much lower standard during Lee's direct appeal, found that Lee could not show even a reasonable probability that his alibi evidence would have changed the outcome of the trial. The district court, in considering Lee's habeas petition, reached the same conclusion. In the court below, even the dissenting judge conceded that Lee could not show cause and actual prejudice.

Finally, Lee cannot access the gateway to review defined by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995), for new evidence of actual innocence that was excluded or otherwise unavailable at trial. If it cannot be said that Lee's alibi evidence would have created a reasonable probability of an acquittal, it certainly cannot be said that no juror could have convicted in light of this testimony, as *Schlup* requires.

More importantly, the affidavits of Lee's would-be alibi witnesses should not even be considered as "new evidence" in a *Schlup* analysis. With due diligence, Lee could have presented this information to the trial court in his motion for new trial, when the trial court still had jurisdiction to correct any error. Lee did not do that and should not now be able to claim that testimony of his family members -- to whom he has always had unfettered access -- should be considered "new" so as to excuse or avoid the procedural default of his due process claim.

3. The Denial of Lee's Oral Motion for Continuance Did Not Violate Due Process

Because Lee failed to abide by Missouri procedural rules requiring a motion for continuance, and the facts supporting it, to be in writing, we do not know precisely what facts the trial court considered when it denied Lee's motion other than that: (i) Lee's would-be alibi witnesses had been in the courthouse that morning, (ii) they probably left after the defense began to present its case, and (iii) Lee said he did

not think they had returned to California because they had plans in Kansas City for that evening.

No one offered any explanation for the departure of Lee's witnesses, other than Lee's counsel who suggested someone might have "threatened them," though he admitted he had no basis for that theory. No one offered the trial court any assurance that Lee's witnesses would be located in a reasonable time. Finally, no one told the trial court what the testimony of these family members would be and why it was of sufficient importance to justify a continuance on the last day of trial. Perhaps the trial court was able to fill in these blanks on its own, particularly as to the subject matter of the witnesses' testimony, by recalling the jury *voir dire* and Lee's opening statement from days earlier. If Lee's motion for continuance had complied with Missouri Supreme Court Rules 24.09 and 24.10, however, those facts would have been prominently presented to the trial court and preserved for this Court's review. Because of Lee's default, we can only guess at what the trial court knew or was told.

On a record such as this, it cannot be said that the trial court violated due process through a "myopic insistence upon expeditiousness in the face of a justifiable excuse for delay." *Unger v. Sarafite*, 376 U.S. 575, 589 (1964).

4. An Evidentiary Hearing Is Not Permitted By Law and Would Serve No Purpose

In an effort to be excused from his procedural default, Lee seeks an evidentiary hearing to help him establish "cause" for his default or, in the alternative, to show that he is "probably actually innocent." Lee also seeks an evidentiary hearing to develop his Ground Three claim, prosecutorial misconduct or official interference, by showing that someone official tricked his would-be alibi witnesses into leaving.

Pursuant to 28 U.S.C. § 2254(e)(2), Lee is entitled to an evidentiary hearing to develop the factual predicate of his claim only if that factual predicate could not have been

discovered previously with due diligence and if, in light of those facts, no reasonable juror could have convicted Lee had the constitutional error not occurred. Lee cannot meet this standard.

Lee is not entitled to an evidentiary hearing on the "cause" he alleges, *i.e.*, that his would-be alibi witnesses suddenly disappeared, because such a "cause" does not depend on why Lee's would-be alibi witnesses left, only that they did leave. Therefore, a hearing would serve no purpose on this issue. For this same reason, Lee is not entitled to an evidentiary hearing on his claims of actual innocence because an explanation for why his would-be alibi witnesses left, whatever it may be, is wholly irrelevant to Lee's guilt or innocence.

This leaves only Lee's request for an evidentiary hearing to develop a factual basis for his prosecutorial misconduct claim (Ground Three). The district court rejected that claim on the ground that Lee defaulted it by not raising it in his new trial motion or direct appeal. Even if Lee were entitled to pursue that claim, Lee is still not entitled to an evidentiary hearing because the evidence he wants to produce, *i.e.*, his would-be alibi witnesses' explanation for why they left, was available to him through the exercise of due diligence immediately following the last day of his trial, easily in time to be presented to the trial court in Lee's motion for a new trial.

Finally, as discussed several times above, had the alleged constitutional error not occurred and had Lee's would-be alibi witnesses presented their testimony, the most that could be said is that the jury might not have convicted Lee. This is far short of establishing that no reasonable juror could have convicted, which is the showing that 28 U.S.C. § 2254(e)(2)(B) requires.

ARGUMENT

I. Lee's claim that his due process rights were violated by the denial of his oral motion for continuance may not be reviewed by a federal court because it was rejected by the Missouri Court of Appeals on independent and adequate state grounds.

On February 24, 1994, the last day of Lee's three-day trial, he sought a continuance because his would-be alibi witnesses could not be found. In his federal habeas petition, filed nearly four years later, Lee claims that the trial court's denial of that continuance violated Lee's due process rights.[2] This is the only claim before this Court.

The Missouri Court of Appeals affirmed the trial court's denial of Lee's motion for continuance because that motion failed to comply with Missouri Supreme Court Rules 24.09 and 24.10 in that Lee's motion was not in writing, it was not supported by an affidavit, and it was not supported by a sufficient factual basis establishing the materiality of the witness's testimony and the likelihood that the witness could be located and produced in a reasonable period of time. The Missouri Court of Appeals did not expressly address the Due Process Clause, but did hold that, even had Lee's alibi

[2]Lee never fairly presented his due process claim to a Missouri court. He did not allege a due process violation in his oral motion for continuance, or in his objection to its denial. Lee did not allege a due process violation in his motion for new trial filed two weeks after trial (JA 20-25, 30-31). Finally, although Lee made a perfunctory reference to the Due Process Clause in his Point Relied On on direct appeal, he did not fairly present this question to the Missouri Court of Appeals because the argument section of Lee's brief contained no specific constitutional argument and no citation to federal authority (JA 110-115), and thus preserved no constitutional question for Missouri appellate review, *see Missouri v. Isa*, 850 S.W.2d 876, 900-901 (Mo. 1993) (en banc).

evidence been presented, there was no reasonable probability that an acquittal would have followed due to the strength of the state's case against Lee.

Thus, the Missouri Court of Appeals disposed of Lee's due process claim on the independent and adequate state ground that a trial court's denial of a continuance will not be reversed on appeal where the motion did not comply with the requirements of the applicable Supreme Court Rules. Under *Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977) and *Coleman v. Thompson*, 501 U.S. 729, 730-31 (1991), Lee's procedural default bars federal review of his claim in this habeas proceeding.

Lee concedes that the ground cited by the Missouri Court of Appeals for disposing of his due process claim is "independent" of the federal law question he sought to raise. Lee contends, however, that the state law ground relied upon by the Missouri Court of Appeals is not "adequate" to bar habeas review of his due process claim.

A. The adequate and independent state ground doctrine, jurisdictional in some contexts, serves important policies of comity and federalism in the context of federal habeas review.

Lee's argument that his due process claim is not barred by his procedural default in state court runs directly contrary to the history and purpose behind the doctrine that a federal court will not reverse a state court judgment supported by an independent and adequate state law ground.

In *Murdock v. City of Memphis*, 20 Wall. 590 (1874), prompted by The Judiciary Act of 1867 which expanded the scope of this Court's review of state court decisions, this Court analyzed what type of review it should perform when a case involving a federal question is decided by a state court on the basis of state law. This Court held that, even though a federal question had been wrongly decided by a state court,

this Court must not reverse the state court judgment if the judgment is supported by a sufficient non-federal reason for the decision. *Id.* at 634-636. *Murdock*, however, merely reaffirmed a principle that this Court has recognized from its foundation, specifically that a state judgment that relies on an independent and adequate state ground supporting the judgment will not be reviewed by this Court. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). *See also Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (noting that this rule was firmly established at least as early as *Klinger v. Missouri*, 13 Wall. 257, 263 (1872)). As this Court noted in *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), this Court lacks jurisdiction to review a state court judgment that rests on an independent and adequate state ground because such would be merely an advisory opinion. *Id.* at 730 (*citing Herb*, 324 U.S. at 125-126).

Coleman recognized that this same principle applies in habeas corpus proceedings where a state court disposes of the federal claim on an independent and adequate state ground, despite that habeas petitions challenge custody rather than the state court judgment itself. *Coleman*, 501 U.S. at 729-730.

> Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-731.

The application of the independent and adequate state law rule in habeas cases preserves the integrity of states' rights to control their own rules of criminal procedure, *Coleman*, 501 U.S. at 731, and the right of the states to correct their own constitutional errors made in criminal trials, *Coleman*, 501 U.S. at 732. If this rule is not carefully and consistently applied, however, states will constantly have to

choose which of these two rights, in practice, will be sacrificed. Enforcing a procedural default would simply invite *de novo* review of a constitutional claim in federal court; and even though declining to enforce a state procedural default will preserve federal deference to the merits decision under 28 U.S.C. §2254(d), it forfeits a state's control over its criminal procedure.

Lee makes no direct challenge to the adequate and independent state ground doctrine. Instead, Lee seeks to constrict the definition of what constitutes an "adequate" state ground, arguing that "adequacy" can only be demonstrated if the precise default asserted can historically be shown to have been enforced in precisely the same circumstances. But such a narrow definition of adequacy necessarily would contract the power of the states -- and expand the jurisdiction and power of the federal courts -- in all state cases (civil or criminal) involving a federal issue. There is simply no basis, in this case or any other, for such a significant reallocation of power in this context. Accordingly, Lee's arguments should be rejected.

B. A state ground is "adequate" for purposes of enforcing a procedural default if it is firmly established and regularly enforced at the time of the petitioner's default, and if the ground asserted is rationally related to a legitimate state interest.

The concept that a state ground, explicitly cited as the reason for a state court's decision and broad enough to justify the decision, may not be "adequate" to prevent federal review arises out of this Court's concern that the state ground asserted may be a legal fiction invented to deprive a federal court of jurisdiction, and not the real reason for the state court's decision at all. *See Rogers v. Alabama*, 192 U.S. 226, 258-259 (1904) (rejecting an Alabama Supreme Court ruling that a two page motion to quash a grand jury due to the

exclusion of African-Americans was unnecessarily long, and holding that a federal court may inquire whether the state law ground "was the real one or whether it was set up as an evasion"); *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 (1920) (holding that this Court may determine whether a state ground offered without fair support is merely a subterfuge to hide a decision on the federal issue); *Terre Haute & Indianapolis RR Co. v. Indiana*, 194 U.S. 579, 589 (1904) (holding that to allow a state court to rely on an untenable construction of state law would provide an easy method to avoid the jurisdiction of this Court).

To ferret out such efforts at subterfuge, this Court has developed a two-prong test. First, the state ground must have been firmly established and regularly enforced at the time of the petitioner's default. Second, the state ground asserted must be rationally related to a legitimate state interest. Where both these characteristics are present, this Court has been satisfied that the asserted state ground is a genuine and good faith attempt by the state to police its own procedures, and has held that federal review of the petitioner's defaulted federal claim is barred.

1. "Adequate" state grounds are firmly established and regularly enforced.

In *Staub v. City of Baxley*, 355 U.S. 313, 318 (1958), this Court found that a state procedural rule that was inconsistently applied and often ignored in Georgia Supreme Court precedents was not an "adequate" state ground to foreclose federal review of the underlying federal issue, thus foreshadowing the "firmly established and regularly enforced" test. *Id.* at 320. Later cases refined that test. *See Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (federal review not barred by state procedural grounds "not strictly or regularly followed"); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (federal review not barred by state procedural ground never before applied with such "pointless

severity"). Finally, in *James v. Kentucky*, 466 U.S. 341, 348 (1984), this court adopted this test in its current form, holding that only state procedural grounds that are "firmly established and regularly followed" will be "adequate" to bar federal review of the underlying federal claim.[3] *See also Ford v. Georgia*, 498 U.S. 411, 423-424 (1991).

As noted above, the purpose of the "firmly established and regularly followed" test is to identify instances in which a state court rejects a federal claim on federal grounds but engages in a subterfuge by interposing a state ground to avoid federal review. Application of this test has repeatedly revealed such legal fictions. *See e.g., Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (rejecting a default based on a claim's not being raised on direct appeal when binding precedent from the state's highest court dictated the claim should have been raised in a post-conviction motion and not on direct appeal); *Barr v. City of Columbia*, 378 U.S. 146 (1964) (deficient objection was not an adequate reason to refuse to review constitutional claim when South Carolina Supreme Court held identical objections sufficient three times in the two months before *Barr* and again held the objections sufficient a few weeks later); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. at 297 (alleged error in organization of brief that was the purported reason for the state court decision was a minor error, if an error at all, and the rule, allegedly violated, was routinely not enforced in cases of much more serious organizational errors); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) (procedural rule enforced was inconsistent with long standing state supreme court decisions);

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[3]"Regularly enforced" or "regularly followed" does not mean that a state court cannot occasionally excuse default and grant relief without forever forfeiting the right to invoke that procedural rule in future cases. *See Harris v. Reed*, 489 U.S. 255, 265 n.11 (1989). However, if a state ground is applied infrequently, unexpectedly, or freakishly, lower federal courts have viewed this as evidence of discrimination against a federal right. *Prihoda v. McCaughtry*, 910 F.3d 1379, 1383 (7th Cir. 1990).

Wright v. Georgia, 373 U.S. 284, 291 (1963) (procedural rule, that an appellate brief explicitly link the argument to a claim in the new trial motion, had never before been enforced in any published case); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958) (procedural rule that contempt citation may be exclusively challenged in mandamus was apparently contrary to existing precedent and had never before been announced and therefore novelty defeated the adequacy of the ground even if the rule could retroactively be fit into a consistent pattern of procedures).

2. "Adequate" state grounds are rationally related to a legitimate state interest.

If an asserted state ground is firmly established at the time it is enforced and it has been regularly enforced in other cases, it is generally correct to conclude such ground will be adequate to prevent federal review. There is, however, a class of rules which do not fit neatly within this test. An example of such a rule is discussed in *Carter v. Texas*, 177 U.S. 442 (1900), in which Texas required challenges to the makeup of a grand jury to be made before the jury was impaneled, but had impaneled the grand jury in a defendant's case before the offense was committed. Such a rule might be firmly established and regularly enforced, but the only purpose it serves is to effectively prevent any challenge to the racial make up of the grand jury. Rules of this type can be easily identified by asking whether the rule is rationally related to a legitimate state interest. *See Davis v. Weschler*, 263 U.S. 22, 25 (1923) (noting local practice shall not be allowed to put "unreasonable" obstacles in the way of federal review); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) (state cannot insist upon compliance with an "arid ritual of meaningless form"); *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (compliance with procedural rule must serve legitimate state interest for rule to bar federal review); *Osborne v. Ohio*,

495 U.S. 103, 124-125 (1990) (citing *Douglas v. Alabama*, 380 U.S. 415 (1965), for the proposition that requiring patently futile repetition of an already rejected objection does not serve a legitimate state interest).

But a state ground that does serve a legitimate state interest, in addition to being firmly established and regularly enforced at the time of the default, reliably is not a subterfuge to mask a state court determination of a federal right and should continue to be respected by the federal courts. Such respect can only be shown by enforcing the procedural bar to federal review of such defaulted claims.

C. Missouri procedural rules relating to motions for continuance were firmly established decades before Lee's trial, and the rules governing appellate review of the denial of motions that did not comply with those rules have been enforced without exception.

Under Missouri law, a trial court's denial of a motion for continuance will not be reversed if the application was not in writing and supported by an affidavit, as required by Missouri Supreme Court Rule 24.09, or if it did not contain the information required by Missouri Supreme Court Rule 24.10. This rule of appellate review was well established prior to Lee's trial, and it is regularly enforced by the Missouri Court of Appeals and the Missouri Supreme Court. Lee, in short, defaulted his right to appeal the trial court's decision on his continuance request by not making a proper application for continuance, and it was this default that was enforced by the Missouri Court of Appeals.

The appellate courts of Missouri have repeatedly and consistently held that the failure to place a motion for continuance in writing is a sufficient reason for affirming a trial court's denial of continuance. *See, e.g., Missouri v. Shryock*, 593 S.W.2d 906, 909 (Mo. Ct. App. 1980) (former

Missouri Supreme Court Rule 25.08 contemplated a written motion for continuance and failure to file a written motion is a sufficient reason to affirm the denial of a continuance); *Missouri v. Diamond*, 647 S.W.2d 806, 808 (Mo. Ct. App. 1982) (denying motion for continuance for the sole reason that the motion failed to comply with Missouri Supreme Court Rule 24.09); *Missouri v. Merrick*, 677 S.W.2d 339, 342 n.2 (Mo. Ct. App. 1984) (failure to comply with Missouri Supreme Court Rule 24.09 is sufficient reason to affirm the denial of a continuance); *Missouri v. Tettamble*, 746 S.W.2d 433, 439 (Mo. Ct. App. 1988) (same); *Missouri v. Drewel*, 835 S.W.2d 494, 496 (Mo. Ct. App. 1992) (same).

Similarly, the appellate courts of Missouri have repeatedly and consistently held that failure to include the information required by Missouri Supreme Court Rule 24.10 in a motion for continuance is a sufficient reason to affirm the denial of a continuance. *See, e.g., Missouri v. Cuckovich*, 485 S.W.2d 16, 21 (Mo. 1972) (en banc) (failure to comply with Missouri Supreme Court Rule 25.08(b) -- the predecessor to Missouri Supreme Court Rule 24.10 -- was in itself sufficient ground to affirm the denial of a continuance in a case in which a defense witness was allegedly too ill to come to court on the day of trial); *Missouri v. Settle*, 670 S.W.2d 7, 13-14 (Mo. Ct. App. 1984) (trial court did not err in denying motion for continuance that did not comply with Missouri Supreme Court Rule 24.10); *Missouri v. Dodd*, 10 S.W.3d 546, 554-555 (Mo. Ct. App. 1999) (failure to comply with Missouri Supreme Court Rules 24.09 and 24.10 is sufficient reason to sustain the denial of a continuance).

Lee does not offer even a single instance in which any Missouri appellate court has ever reversed a trial court's denial of a motion for continuance in a case in which the motion did not comply with Missouri Supreme Court Rules 24.09 or 24.10. Instead, Lee presents two arguments why that fact alone should not control the analysis in this case.

First, Lee argues that the state ground in this case, *i.e.*, that an appellate court will not reverse a denial of a

motion for continuance if that motion does not comply with Rules 24.09 and 24.10, was not "firmly established" with respect to circumstances such as Lee's in which the disappearance of the witnesses was truly unexpected (Petitioner's Brief 35). Second, Lee argues that, even if this state ground was firmly established, it was not "regularly enforced" because, in affirming denials of motions for continuances that did not comply with these rules, Missouri appellate courts sometimes relied upon the fact that the underlying motion lacked merit (Petitioner's Brief 31-34), or took note of the fact that the trial court had taken some effort to locate a missing witness before denying a motion for continuance that otherwise failed to comply with Rules 24.09 and 24.10 (Petitioner's Brief 35-36). Both arguments fail because both ignore Missouri law.

1. The state ground at issue was firmly established, even in cases of exigency, regardless of whether Lee's precise fact situation had ever been litigated before.

Lee's first argument -- that compliance with Rules 24.09 and 24.10 would not be required in cases where the disappearance of a witness was truly unexpected -- is plainly wrong. These rules state in mandatory language what "shall" be in a motion for continuance and the form such a motion "shall" take. The plain language of these rules contains no exceptions for exigent circumstances. Indeed, Rule 24.10 deals specifically with motions for continuance based upon a missing witness, whether sudden or not. Moreover, Lee's characterization of Missouri cases is simply wrong.

Missouri appellate courts for decades have affirmed the denial of continuances due to the insufficiency of an application for continuance even when a witness became unavailable on short notice. *See e.g. Missouri v. Gadwood*, 116 S.W.2d 42, 49-50 (Mo. 1937) (defendant's counsel

received a letter two days before trial that witness might be too ill to attend trial, and phone call on the day of trial from witness's wife saying he was too ill to attend, but produced only hearsay rather than affidavits containing proper evidence to support the motion for continuance); *Missouri v. Cuckovich*, 485 S.W.2d 16, 21 (Mo. 1972) (en banc) (defendant's wife, a material witness, was allegedly too ill to attend court on the day of trial, but motion for continuance did not comply with the rule and a hearsay letter from physician was inadequate support for the motion); *Missouri v. Scott*, 487 S.W.2d 528, 530 (Mo. 1972) (the only non-law enforcement witness to an incident in which a defendant allegedly struck a law enforcement officer did not appear to testify at trial but motion for continuance did not comply with former Rule 25.08); *Missouri v. Settle*, 670 S.W.2d 7, 13-14 (Mo. Ct. App. 1984) (witness's vehicle had allegedly broken down in Arizona, but motion for continuance did not comply with Rules 24.09 or 24.10); *Missouri v. Freeman*, 702 S.W.2d 869, 873-874 (Mo. Ct. App. 1985) (when defendant's sister who had been subpoenaed as a defense witness did not appear, a written motion for continuance filed at the close of the state's case was denied because it did not contain the information required by Rule 24.10, and was not supported by an affidavit and the witness had told the serving officer she would not appear and lie for her brother).

These cases, stretching back more than sixty years, firmly establish that a Missouri appellate court will not reverse a denial of a motion for continuance that was not in proper form, even where the need for the continuance was "truly unexpected." Lee does not point to a single Missouri appellate decision reversing the denial of a continuance -- even when counsel had little notice that a witness would not be available to testify -- if the motion for continuance was defective. The best Lee can do is cite two cases for the proposition that Missouri case law might excuse such a failure to comply (Petitioner's Brief 35). The cases cited, however, do not stand for that proposition.

In *Missouri v. McCarter*, 820 S.W.2d 587, 589 (Mo. Ct. App. 1991), the Missouri Court of Appeals affirmed the denial of an oral motion for continuance, made on the day of trial due the absence of an alleged eyewitness, relying on Rules 24.09 and 24.10 and cited the general principle that failure to comply with Rule 24.09 is itself sufficient reason to deny a motion for continuance. *Id.* The Court of Appeals also pointed out that this is "particularly true where the factual basis for the motion was not a last minute or unexpected surprise." *Id.* Lee would substitute "only true" for "particularly true," but that is not what the court said.

Similarly, in *Missouri v. Adams*, 808 S.W.2d 925, 928-930 (Mo. Ct. App. 1991), the Missouri Court of Appeals affirmed the denial of an oral motion for continuance, citing Missouri Supreme Court Rule 24.09. There, counsel had not attempted to subpoena the witnesses until the day before trial, had announced ready for trial despite their absence and only made an oral request for continuance after *voir dire*. *Id.* Contrary to Lee's suggestion, the court merely commented appellant would have had a stronger argument had he subpoenaed his witnesses in a timely manner and had their absence been caused by illness, accident or some other unexpected cause. *Id.*

McCarter and *Adams* cannot be fairly read in the context of existing Missouri precedents to hold or even suggest that failure to file a proper motion will be excused by an appellate court in the case of a sudden and unexpected disappearance of a witness. Instead, the Missouri Court of Appeals was simply criticizing defendants who had not been diligent in trying to find their witnesses and/or had not timely filed a motion for continuance upon learning that the witnesses would not appear. Missouri cases, including *McCarter* and *Adams*, firmly establish the ground that a denial of a motion for continuance will not be reversed on appeal if the motion failed to comply with applicable Supreme Court Rules.

2. The state ground at issue is regularly enforced even though appellate courts may cite other grounds in affirming a denial of a non-conforming motion.

Lee's second argument -- that the state ground at issue has not been regularly enforced -- fails as well. The state ground at issue is that Missouri appellate courts will not reverse a denial of a motion for continuance that does not comply with the applicable rules. Missouri appellate courts do not fail to enforce that rule if, as they affirm, they note that the underlying motion lacked merit. An appellate court may, of course, affirm the trial court for any reason supported by the record, just as in the present case where the appellate court relied on Rules 24.09 and 24.10 even though the trial court did not explicitly do so. To do so is not a failure to enforce the rule.

Lee cites several cases in which a trial court took some action to locate a missing witness based on an oral motion for continuance (Petitioner's Brief 35-36). Only two of these cases involved delay of the trial, and the holdings of these cases actually support Respondent's position.

In *Missouri v. Sneed*, 874 S.W.2d 489, 490-491 (Mo. Ct. App. 1994), the trial court recessed for several hours and issued a body attachment for a missing subpoenaed witness on the second day of a three-day trial. Ultimately, however, the trial court denied the defendant's motion for continuance and was affirmed by the Missouri Court of Appeals because the application did not comply with Rule 24.09. *Id.*

Similarly, in *Missouri v. Coats*, 835 S.W.2d 430, 433-434 (Mo. Ct. App. 1992) the trial court was faced with an oral motion for continuance in the middle of trial based on a missing witness. The trial court had the case proceed with the defendant testifying out of order, but continued the case on a Friday afternoon to give the defense time to find and produce the witness on the following Monday. *Id.* The trial

court's decision to deny the lengthier continuance sought by the defendant was affirmed because the application for continuance did not comply with Rule 24.09. *Id.*

Finally, Lee cites *Missouri v. Gasaway*, 720 S.W.2d 3, 5-6 (Mo. Ct. App. 1986). In *Gasaway*, a subpoenaed witness did not appear on the second day of trial and the trial court issued a writ of body attachment. On the third day, however, the trial court denied a motion for continuance. *Id.* This denial was affirmed because the application for continuance did not comply with Rule 24.10. Thus, the cases Lee cites as evidence that the relevant state ground of appellate review has not been regularly enforced actually stand as examples of cases in which the appellate courts enforced the rule in question.

D. Missouri Supreme Court Rules 24.09 and 24.10, and related rules of appellate review, serve the legitimate state interest of requiring the party seeking a continuance to place before the trial court in an orderly and reliable manner all facts necessary to determine the issue, and to memorialize those facts so as to facilitate appellate review.

The state ground asserted in this case is that a Missouri appellate court will not reverse a trial court order denying a motion for continuance if the motion did not comply with Missouri Supreme Court Rules 24.09 and 24.10. These rules work together to enhance the reliability of a trial court's determination of whether to delay a scheduled criminal[4] trial due to the absence of a witness. They do so in

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[4]Missouri has similar rules for civil trials. *See* Missouri Supreme Court Rules 65.03, 65.04 and 65.05. Compliance with the rules governing motions for continuance by all litigants, civil and criminal, serve the same

a fashion that, if complied with, facilitates meaningful appellate review. These are legitimate state interests.

Rule 24.10 sets forth the information required in a motion for continuance due to a missing witness. Rule 24.09 enhances the reliability of that information by requiring it to be in writing, and therefore presumably more thoughtfully prepared, and provides assurance the information is reliable[5] by requiring an affidavit setting forth the facts on which the application is based. Thus, Rules 24.09 and 24.10 are clearly related to legitimate state interests.

Lee argues that, even assuming Rules 24.09 and 24.10 serve a legitimate purpose generally, they served no legitimate purpose in his case (Petitioner's Brief 34-41). In short, Lee argues that compliance with Rule 24.09 was impossible, and that he substantially and sufficiently complied with Rule 24.10. Lee is wrong on both counts.

Nothing would have prevented counsel from drafting a brief motion and affidavit complying with Rules 24.09 in longhand while seated in the courtroom. If counsel had complied with Rule 24.09, doing so would have provided counsel a framework for complying with the factual showing that Rule 24.10 requires, which his oral motion did not show.

Lee's oral motion for continuance did not come close to containing the information required by Rule 24.10 (JA 20-22). Among other things, Rule 24.10 requires the motion and affidavit to state facts showing the materiality of the evidence

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legitimate state interests.

[5]*See Missouri v. Cuckovich*, 485 S.W.2d 16, 21 (Mo. 1972) (en banc) (trial court properly denied continuance when the only evidence offered to support allegation that a material witness was absent on the day of trial due to illness was a letter from a physician that was not considered because it was hearsay); *Missouri v. Madison*, 997 S.W.2d 16, 21 (Mo. 1999) (en banc) (opening statements and closing arguments are not evidence).

the missing witness would supply. Lee's counsel never mentioned during his oral motion for continuance the testimony he expected the missing witnesses to give. Rule 24.10 requires that the motion and affidavit set forth the facts giving rise to a reasonable belief that the witness can be located within a reasonable time. Lee's counsel gave the trial court no reason to believe that the missing witnesses could be located within a reasonable time, only that Lee said he did not think they had left Kansas City. The only information given the trial court in the oral motion for continuance was that the witnesses had been subpoenaed for that morning, that they had been in the courthouse until after the start of defendant's case, and that they were missing. Lee's counsel offered to locate an address to use for a capias warrant, but had no assurance the witnesses were there (JA 20-22).

Lee argues that, if the trial court had reviewed the entire record before it, including *voir dire* and opening statements, it could have filled in the gaps in Lee's oral motion (Petitioner's Brief 37-39). This ignores the point of the rule. Even if the trial court could find the required information by review of the entire record, which is questionable at best,[6] the point of Rules 24.09 and 24.10 is to put specific information in front of the trial court in a reliable form that the court can easily and intelligently rule on, and to give an appellate court precisely the same information for

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[6]Nothing in the record available to the trial court demonstrated reasonable grounds for belief that the witnesses would testify in a reasonable time. In fact, in his written motion for a new trial filed two weeks later, Lee offered no explanation for the disappearance of his would-be alibi witness, let alone any representation that counsel would have been able to produce them had the continuance he sought been granted. Moreover, at a hearing on counsel's effectiveness under Missouri Supreme Court Rule 29.07 held nearly two months after trial, counsel again failed to provide any such explanation or assurance and, in fact, stated that the witnesses "left before they could testify. They went back to California" (JA 37). Lee did not disagree with this or seek to provide any such explanation or representation himself (JA 37-40).

later review to determine if the trial court abused its discretion. This legitimate purpose is frustrated if the movant's failure to comply forces the trial court to assemble this information on its own.

Rules 24.09 and 24.10 serve legitimate state interests generally, and did so in this case. Because the Missouri Court of Appeals likely may not have considered that it had a federal claim properly before it,[7] this is not a case in which the Missouri Court of Appeals sought to prevent federal review of the denial of Lee's federal claim through the subterfuge of interposing state procedural rules.

E. This Court should not abandon the traditional tests this Court has established for "adequacy" in favor of the balancing test Lee proposes.

This Court's traditional tests for adequacy -- "clearly established and regularly enforced" and "rationally related to a legitimate state interest" -- confirm that the Missouri ground at issue, *i.e.*, that a denial of an oral or deficient motion for continuance will not be reversed on appeal, is truly adequate to bar federal review of Lee's underlying due process claim. Therefore, Lee advocates that this Court adopt a new test.

Lee argues that a state ground should not be considered "adequate" to bar subsequent federal review unless

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[7]Lee's failure to make a constitutional objection at trial, to put forward a constitutional theory in his new trial motion, and to make specific constitutional arguments in his direct appeal brief were all fatal under Missouri law to any review of his constitutional claim that the denial of a continuance violated due process. *See Owsley v. Bowersox*, 234 F.3d 1055, 1058 (8th Cir. 2000) (under Missouri law, a constitutional issue to be preserved for review, must be raised at the earliest time consistent with proper procedure, must cite the specific sections of the Constitution allegedly violated, must be raised in the new trial motion, and must adequately briefed on appeal).

the state's interest in enforcing its procedural ground in that case outweighs the overarching federal interest in reviewing federal claims. Lee relies on the dissent in the court below, which in turn relied on *dicta* from *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) for the proposition that "a state procedural ground was adequate to preclude review of a federal constitutional claim only if it outweighed the strong federal interest in hearing federal claims" (JA 247-248).

The balancing test Lee advocates has already been explicitly adopted by the Sixth Circuit, which has stated the following: "The adequacy of the state ground is determined by examining the state's legitimate interests in the procedural rule in light of the federal interest in considering federal claims." *Reynolds v. Berry*, 146 F.3d 345, 347 (6th Cir. 1998). *See also Smart v. Scully*, 787 F.2d 816, 819-21 (2d Cir. 1986) (requirement that a motion to withdraw a guilty plea contain sworn statements of fact, though presumed legitimate, will not be enforced as procedural default because it served no legitimate or substantial state interest, and, therefore, "deliberate bypass" analysis required).

Such a balancing test, however, threatens a substantial setback to this Court's comity and federalism jurisprudence. The *dicta* in *Henry v. Mississippi* was denounced when uttered, *see Henry v. Mississippi*, 379 U.S. 443, 457-465 (1965) (Harlan J. dissenting) ("a severe dilution if not complete abolition of the concept of 'adequacy' as pertaining to state procedural grounds"), and was not followed in *Wainwright*, which undertook no balancing of the state and federal interests and relied, instead, on the "cause and prejudice" exception to prevent a miscarriage of justice in the extraordinary case.

As discussed in detail above, in *Coleman* and its predecessors, this Court has already balanced the state and federal interests and found that considerations of comity and federalism require these interests be balanced in favor of respecting a state's right to enforce its own procedures and correct its own errors by adhering to the "independent and

adequate state grounds" doctrine in federal habeas cases. The history and purpose of the traditional adequacy tests set forth above is to identify actual cases of state court subterfuge in which a state ground is disingenuously asserted to preclude federal review of a state court's federal decision -- and those tests have served that purpose well. Lee presents no reason why those tests should be abandoned, other than that a principled application of them in his case shows that his due process claim is procedurally barred from federal review.

Therefore, where a state procedural rule is rationally related to a legitimate state interest and that rule was firmly established and regularly enforced at the time of the default, and a default occurred and was relied on by the state courts, the state law reason for the state court decision is adequate to bar federal review of the underlying federal claim. Accordingly, the lower court should be affirmed.

II. Lee cannot establish any basis for this Court to excuse the procedural default enforced by the Missouri Court of Appeals.

When a procedural default is shown to bar federal habeas review of a state prisoner's constitutional claim, the prisoner must show something more than that his underlying claim is valid in order to overcome his procedural default. If the doctrine of procedural default barred only constitutional claims that were not or could not be proven, the doctrine would be meaningless. This Court has defined the "something more" that need be shown as: (i) "cause" for the default and "actual prejudice" stemming from the constitutional violation, *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); or (ii) new evidence of actual innocence in light of which no reasonable juror would convict, *Schlup*, 513 U.S. at 337. These exceptions adequately provide for the rare cases in which a strict application of procedural default might work a manifest injustice.

Lee alleges that his default should be excused either because he can show "cause" and "actual prejudice," or probable actual innocence. Lee cannot meet either of these tests, however, and review of his underlying due process claim is therefore properly barred.

A. Lee's allegation of cause to excuse his default is without merit because the cause he alleges has no causal connection with the default he alleges, and the allegation of cause is itself defaulted.

In *Wainwright*, this Court adopted the "cause and prejudice" test as a guarantee that the enforcement of state law procedural default would not cause a habeas petitioner to be "the victim of a miscarriage of justice." While leaving the precise definition of the terms to later cases, this Court found that a showing of cause for a procedural default, and actual prejudice arising from the default, could excuse a procedural default based on an adequate state ground in a habeas corpus case. *Wainwright*, 433 U.S. at 90-91.

This Court defined such "cause" in *Murray v. Carrier*, 477 U.S. 478, 488 (1986), which stated that "the existence of a cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* This Court noted that this test could be met by showing that "the factual or legal basis for a claim was not available to counsel [citation omitted] or that some interference by officials [citation omitted] made compliance impracticable." *Id.*[8]

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[8]To counsel's knowledge, this Court has found "cause" sufficient to excuse a state law procedural default in only three of its cases. *Reed v. Ross*, 468 U.S. 1, 16 (1984) (constitutional claim so novel at the time of trial it was not reasonably available to preserve and raise on appeal); *Amadeo v. Zant*, 486 U.S. 214, 217 (1988) (district attorney's office

1. Lee's allegation of cause had no effect on Lee's procedural default.

Lee alleges cause to excuse his procedural default exists because his alibi witnesses suddenly left the courthouse during trial and suggests that, if they left because they were told to by a court officer, this makes his showing of cause even stronger (Petitioner's Brief 42-43). Certainly, this "caused" Lee to seek a continuance, but that was not his procedural default. Lee's default was that his oral motion for continuance did not comply with Missouri Supreme Court Rules 24.09 and 24.10. Nothing that Lee's would-be alibi witnesses did "caused" Lee's counsel to ignore these firmly established and regularly enforced state procedural rules.

Whatever the exigencies, counsel could still have briefly drafted a written motion and affidavit -- on a legal pad if necessary -- and presented these to the court. The sudden disappearance of Lee's would-be alibi witnesses did not impede counsel's compliance with this rule or render compliance impracticable.

But, assuming for the sake of argument as the Missouri Court of Appeals did (JA 127), that Lee's failure to comply with Rule 24.09 could be excused under the circumstances, the failure of Lee's oral motion to comply with Rule 24.10 clearly cannot be excused by the circumstances. The oral motion for continuance (JA 20-22) did not set forth the materiality of the witnesses' testimony or the particular facts that they would prove as required by Missouri Supreme Court Rule 24.10(a) and (c). Nor is it fair to say that the entire trial record, much less Lee's oral motion

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directed jury commissioners to under represent women and African-Americans on the master jury list, and prosecutor did not deal honestly with defense lawyers as county officials concealed racial disparity on the jury lists); *Strickler v. Greene*, 527 U.S. 263 (1999) (prosecutor excluded exculpatory information from the file given to the defense, while stating that the defense had "everything known to the government").

for continuance, contains facts showing that the testimony of the witnesses could be obtained in a reasonable time, or that the witnesses were not absent with Lee's consent, as required by Missouri Supreme Court Rule 24.10(b) and (d). The sudden disappearance of Lee's would-be alibi witnesses did not impede counsel's compliance with Rule 24.10, or render such compliance impracticable.

It is important to note that the foregoing analysis does not depend on why Lee's alibi witnesses left. If, as in the Habeas Version, these witnesses left because a court official told them their testimony would not be needed until the next day, that fact would have had no greater or lesser "causal" relationship to Lee's counsel's failure to abide by Rules 24.09 and 24.10 than if -- as counsel stated -- he had no idea why they left. So, too, if the PCR Version is the truth and someone working for the prosecutor told Lee's would-be alibi witnesses they would not be needed at all. So it would be, as well, if Lee's would-be alibi witnesses left because they did not want to perjure themselves on Lee's behalf.

Accordingly, neither the disappearance of Lee's would-be alibi witnesses (for whatever reason), nor the state, nor any other external cause made it impracticable for Lee to comply with Supreme Court Rules 24.09 and 24.10. Therefore, under *Wainwright* and *Murray*, this allegation cannot suffice to excuse his default and federal review of Lee's underlying claim is barred.

2. Lee cannot seek to excuse his procedural default by alleging a "cause" that was, itself, defaulted.

To the extent that Lee's allegation of cause depends on why his would-be alibi witnesses left (*i.e.*, prosecutorial misconduct), this allegation necessarily fails for another reason. Neither Lee's new trial motion nor the direct appeal portion of his brief to the Missouri Court of Appeals, which necessarily tracked the new trial motion, alleged that a court

officer or anyone else told the witnesses to leave (JA 31-32, 90-95). Accordingly, Lee cannot raise as "cause" sufficient to excuse default. an allegation that was, itself, not properly presented to the Missouri courts. *See Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (habeas petitioner could not allege ineffective assistance of counsel as cause to excuse default when he did not properly challenge counsel's effectiveness on the issue in state court); *Boliek v. Bowersox*, 96 F.3d 1070, 1072-73 (8th Cir. 1996) (habeas petitioner could not assert, as cause for default of claims, error by motion court in not allowing claims to be added when he did not challenge the order preventing further amendments in a state appeal).

It was not until July 3, 1995, when court-appointed counsel filed an amended post-conviction relief motion verified by Lee under oath as being true and correct to the best of his knowledge, that this allegation was made (JA 55-64). This motion alleged that the witnesses were told they could leave by an "unknown person" who it had since been learned was "believed to be working for the Jackson County Prosecutor's Office" (JA 58).[9] The prosecutor's response to this claim pointed out that it was not cognizable in a post-conviction proceeding and, further, that it simply was not possible to believe that defense witnesses would come 1,000 miles to testify and then leave at the direction of the prosecution without even talking to Lee or his counsel (Appellant's Addendum 12a-13a). The post-conviction review court agreed, and rejected this claim as not cognizable in a post-conviction proceeding because it should have been raised in the direct appeal (JA 70) (*citing Stuckey v. Missouri*, 756 S.W.2d 587, 590 (Mo.Ct.App. 1988) (trial errors or prosecutorial misconduct claims, even those affecting

[9]By the time this case reached federal court, the alleged person had changed from an employee of the Jackson County Prosecutor's Office into a "court security officer" (JA 237), referred to as "those people in Missouri" in one affidavit (JA 169), and as an "officer of the court" in two others (JA 172, 174).

constitutional rights, cannot be brought in a post-conviction relief action absent special circumstances that prevented the claim being brought in the direct appeal process)).

Lee has never put forward any reason -- far less a plausible reason -- why the PCR Version of the disappearance of Lee's would-be alibi witnesses, to say nothing of the more-recent Habeas Version of their disappearance, was not presented in his motion for new trial and preserved for direct appeal review. He had two weeks to prepare and file his new trial motion, more than enough time to call his mother, sister, and step-father and ask what happened. Even after he filed his motion, he had an additional six weeks to prepare for the hearing on that motion. But, at the hearing, when the trial court asked if he had anything to add to his written motion, Lee's counsel said "no." When the subject of the disappearance came up, Lee himself offered no explanation. Therefore, under Missouri law, Lee's claim that "someone official told my witnesses they could leave" was properly rejected as noncognizable by the post-conviction court, and has never properly been presented to the Missouri courts. Lee cannot now allege as cause for his default a theory that he never properly presented to the Missouri courts.

B. Lee cannot show "actual prejudice" because, even if the continuance had been granted and Lee's would-be alibi witnesses produced, alibi evidence from family members cannot create a probability of an acquittal when four other witnesses directly contradict Lee's alibi theory.

It is well established that, even if a habeas petitioner shows cause to excuse a state procedural default, he must also show actual prejudice from the underlying error before he may receive review of the underlying claim. *United States v. Frady*, 456 U.S. 152, 168-169 (1982). This Court has never precisely defined what "actual prejudice" is, but the

precedents of this Court present a clear picture of where in the continuum of prejudice "actual prejudice" should fall.

Frady tells us that "actual prejudice" is a "significantly higher" standard of review than the plain error[10] analysis used in review of unpreserved claims of error on direct appeal. *Frady*, 456 U.S. at 166. "Actual prejudice" must also necessarily require a greater showing than a reasonable probability that an alleged error changed the outcome of trial, which is the standard used to determine prejudice from a preserved due process claim. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining prejudice required to show a Due Process Clause violation for failure to disclose); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (employing same standard for prejudice required to show ineffective assistance of counsel). *See also Zinzer v. Iowa*, 60 F.3d 1296, 1299 (8th Cir. 1995) (actual prejudice is necessarily a higher standard than *Strickland* prejudice). Finally, "actual prejudice" must be greater than a showing that the alleged error "had a substantial and injurious effect on the jury's verdict," which is the test for prejudice as part of a harmless error analysis for a non-defaulted claim in a habeas case. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

On the other hand, as this Court pointed out in *Murray*, "actual prejudice" under a *Wainwright* analysis is necessarily less than a showing that a constitutional violation has resulted in the conviction of one who is probably actually innocent. *See Murray*, 477 U.S. at 495-496. This later showing was developed as a test to provide relief in the rare case in which a fundamental miscarriage of justice occurred but the petitioner could not meet the cause and actual prejudice standard. *Id.* It necessarily follows that the level

[10] *See United States v. Young*, 470 U.S. 1, 15 (1985) (plain error defined as particularly egregious errors that seriously affect the fairness, integrity or public reputation of judicial proceedings in cases in which a miscarriage of justice would otherwise result).

of prejudice required in a gateway actual innocence claim, which does not require a showing of cause, is higher than "actual prejudice," which does require a showing of cause.

Therefore, a showing of "actual prejudice" requires more than plain error, more than *Bagley* or *Strickland* prejudice, and more than *Brecht* prejudice, but less than a probability that no reasonable juror would convict in light of newly discovered evidence. *See Schlup*, 513 U.S. at 337.

Both the Missouri Court of Appeals on Lee's direct appeal, and the district court considering Lee's habeas petition below, concluded that Lee could not show a reasonable probability that the outcome of trial would have been different had a continuance been granted (JA 128, 217). The district court correctly pointed out that there was "overwhelming evidence that Petitioner was in Jackson County on the day of the murder and the previous night" (JA 217, n. 3). Lee's presumably interested, closely related alibi witnesses were contradicted by four eyewitnesses who had no interest in seeing the wrong person convicted (JA 124-125; R.8; T.Tr. 450-453, 471-474). The court below did not reach this question because it found that Lee had not established "cause," but even the dissent conceded that, "[i]f Lee had been allowed a short continuance and had been able to present his alibi defense, he might very well have been acquitted, but he might also have been convicted" (JA 239). This is not "actual prejudice."

Lee's showing of prejudice does not even satisfy the *Bagley* or *Strickland* standards, *i.e.*, that a reasonable probability would exist that the outcome of trial would have been changed. Thus it is certain that Lee cannot meet the test for "actual prejudice," which is stricter still. Lee has therefore failed to meet the *Wainwright* test to have his procedural default excused and his underlying federal claim reviewed. Accordingly, the judgment of the lower court should be affirmed.

C. Lee has no new evidence of actual innocence sufficient to avail himself of the *Schlup* gateway because his alibi evidence is not newly discovered and because his alibi theory was refuted by four disinterested witnesses.

This Court defined the actual innocence gateway for review of procedurally defaulted claims in *Schlup v. Delo*, 513 U.S. 298 (1995). In *Schlup*, this Court held this gateway is available only if the petitioner makes "a showing that no reasonable juror would have convicted him in light of new evidence." *Id.* at 327.[11] This Court defined evidence that may be reviewed in such an analysis to include evidence that was either excluded or unavailable at trial. *Id.* at 328.

The court below rejected Lee's *Schlup* claim because the evidence Lee proffered (*i.e.*, the affidavits of his three family members claiming Lee was in California at the time of the murder and that they did not testify because an officer of the court had told them they could leave and come back the following day), was not "new" in that it was available to Lee at the time of trial and certainly in time to be presented in his new trial motion. The court below was merely applying the same due diligence test to claims defaulted in state court that Congress has now -- after *Schlup* -- applied to abusive claims defaulted by failure to raise a claim in an initial federal habeas petition. *See* 28 U.S.C. § 2254(e)(2)(B) (requiring a showing that the factual predicate of a claim could not be

[11]The United States District Court for the Eastern District of Missouri, following remand by this Court, found that habeas petitioner, Lloyd Schlup, had made a gateway showing of actual innocence. *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995). Schlup was scheduled for a new trial when, during voir dire, he pled guilty and admitted his participation in the murder. *See* Bob Watson, *Killer Lies to Get Off Death Row Then Pleads Guilty to Murder*, ***JEFFERSON CITY POST-TRIBUNE***, *March 24, 1999 at 1.*

discovered previously through due diligence, and clear and convincing evidence that no reasonable fact finder would have convicted but for constitutional error). There is no good reason not to apply the same due diligence standard to a state court default as to a default committed in the federal habeas process itself. In fact, principles of comity would seem to require that state prisoners be required to exercise at least the same degree of diligence in presenting their claims to state courts as they must employ in federal court.

In this case, the court below found that the factual basis for Lee's claim of actual innocence existed at the time of trial and could have been properly presented in state court (JA 235). This is accurate. There is no good reason that the substance of the information in the affidavits could not have been presented in the new trial motion, or at a hearing on the new trial motion, or at Lee's Rule 29.07 hearing, when the trial court could have acted on this information consistent with Missouri procedures (JA 31-32, 37-41).

In an alternative holding, the court below rejected Lee's actual innocence claim for the following reason: "Even assuming the alibi testimony was new evidence, Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi" (JA 235). Even the dissent agreed with this analysis pointing out that Lee still might have been convicted if the alibi testimony had been presented (JA 238-239).

This analysis is clearly correct. As set forth above, Lee's alibi testimony -- assuming it could ever have been procured -- would not have created a reasonable probability that the outcome of the trial would have been different. Because this testimony does not meet the *Bagley* or *Strickland* test for prejudice, and therefore cannot meet the higher standard of "actual prejudice," it is not possible that this same evidence satisfies the *Schlup* standard which is even higher still. This is especially true when the lack of credibility of the alibi witnesses is considered, together with the extreme

delay in offering an explanation why the alibi witnesses did not testify at trial, which *Schlup* teaches must also be considered. *Schlup*. 513 U.S. at 328. Lee simply does not make a showing of actual innocence under any reasonable reading of *Schlup*, and thus cannot avail himself of that gateway to federal review of his underlying federal claim.

III. Lee's underlying due process claim has no merit because the state court's resolution of this issue is presumed correct and, even under a *de novo* review, the claim lacks merit because the trial court did not deny the continuance based on an arbitrary and unreasoning insistence on haste in light of a justifiable request for delay.

Even if this Court excuses Lee's procedural default, or holds that one did not occur, Lee is still not entitled to any relief because his claim that the trial court's denial of his oral motion for continuance violated due process lacks merit.

The first two of the Missouri Court of Appeals' three alternative holdings relating to the denial of Lee's oral motion for continuance were procedural. The third holding was not:

> Even if the appellant established an abuse of discretion by the trial court in denying his motion, he cannot show prejudice thereby, which is necessary to prevail on this point.

(JA 128 (citation omitted)). This third alternative holding is a merits holding, albeit possibly limited to a state law abuse of discretion claim. But, because the Missouri Court of Appeals made no plain statement to the contrary, it should be presumed that the court was performing a federal law analysis.[12] *Harris v. Reed*, 489 U.S. 255, 263-265 (1989).

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[12]The type of prejudice analysis being performed by the Missouri Court of Appeals is appropriate to a preserved due process claim. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining prejudice

Having reached and resolved the federal claim on the merits, therefore, this resolution is entitled to the deference required in 28 U.S.C. §2254(d) and should not be disturbed unless it is contrary to, or an unreasonable application of, *Unger v. Sarafite* or other precedent of this Court.[13]

In *Unger v. Sarafite*, 376 U.S. 575, 588-593 (1964), this Court found that a denial of a continuance does not necessarily violate due process even if it prevents a party from having counsel or offering evidence. *Id.* But, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" can violate due process *Id.* at 589. *See also Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (proper to inquire whether trial court employed an arbitrary and unreasoning insistence on haste). This analysis focuses on "the circumstances presented in every case particularly the reasons presented to the trial judge at the time the request is denied." *Unger*, 376 U.S. at 589. Thus, *Unger* focuses on whether the facts presented to the trial court demonstrated a substantial need for the witness and a substantial likelihood that witness would be produced in a reasonable time.[14]

In the present case, Lee did not present any facts to the trial court in his oral motion for continuance showing a substantial need for the missing witness, but asks this Court now to charge the trial court with having recalled Lee's counsel's comments on this issue in opening arguments and *voir dire*. Worse, there were absolutely no facts before the trial court on which it could have based a conclusion that the missing witnesses would be produced in a reasonable time.

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required to show a Due Process Clause violation for failure to disclose).

[13]*See Williams v. Taylor*, 529 U.S. 362, 412-413 (2000) (O'Connor, J. concurring) (defining the "contrary to" and "unreasonable application of" language of 28 U.S.C. §2254(d)).

[14]These critical facts under *Unger* closely track the showing required by Missouri Supreme Court Rule 24.10, with which Lee did not comply.

Lee offered no such assurance in his oral motion for continuance. More importantly, Lee did not assert in his new trial motion -- filed two weeks later -- that his would-be alibi witnesses were still in Kansas City the day they disappeared, or that they would have testified on the following Friday, or Monday, or any other day. Even with the benefit of four years of hindsight, there is nothing in the record credibly that shows that a one-day, or even a one-week, continuance would have produced these witnesses' testimony. Whether applying *Unger de novo* to the facts as presented to the trial court judge in Lee's oral motion for continuance, or determining whether the Missouri Court of Appeal's resolution of Lee due process claim on the merits was contrary to or an unreasonable application of *Unger* under 28 U.S.C. §2254(d), Lee has failed to establish any basis for relief.

Lee cites three cases in which he contends "this Court found that the denial of a continuance deprived the defendant of a fair trial in circumstances no more compelling than these" (Petitioner's Brief 25). None of these cases are on point. In *Pate v. Robinson*, 383 U.S. 375, 377-378 (1966), this Court affirmed the grant of habeas relief because a defendant was denied a competency hearing but explicitly declined to rule on a claim that a criminal trial was conducted in an unduly hurried manner without a fair opportunity to obtain expert psychiatric testimony. In *Chandler v. Fretag*, 348 U.S. 3 (1954), due process required a continuance when a *pro se* defendant charged with housebreaking and stealing three dollars was told on the day of trial he would be tried as a habitual offender subject to life imprisonment without the possibility of a parole. In *Reynolds v. Cochran*, 365 U.S. 525, 529 (1961), a defendant was arrested and apparently summarily convicted on the same day and sentenced to ten years' imprisonment for an offense that did not even exist. When he requested a two-day delay prior to trial, so that his retained counsel could arrive, the judge replied "No point in calling a doctor to a man already dead." *Id.*

It is not fair to say that Lee's case presents circumstances as compelling as those in *Chandler* and *Reynolds*. It simply cannot be said that the trial court violated the Due Process Clause based on the evidence presented to it, because as in *Unger*, that evidence did not provide a justified reason for delay.

And finally, even if a due process violation could be shown, *Brecht v. Abrahamson*, 507 U.S. 619 (1993) teaches that a writ of habeas corpus will not issue merely because there is a reasonable possibility that the trial error contributed to the verdict. *Id.* at 637. Rather, the error must have had "a substantial and injurious effect or influence in determining the jury's verdict." *Id.* In this case, the most that can be said is that the alleged error created a possibility that the verdict might have been different despite the four eyewitnesses that would contradict the alibi evidence. This is not sufficient to justify a writ of habeas corpus, and the judgment of the lower court should be affirmed.

IV. Lee is not entitled to an evidentiary hearing either to develop an entirely different constitutional claim that has long-since been separately defaulted and is not before this Court, or to develop his allegation of "cause," or to establish his "actual innocence."

Lee argues that this Court should remand for an evidentiary hearing so that he can prove that his would-be alibi witnesses were told by a court official to leave because their testimony would not be needed until the next day. This state interference, Lee claims, is a separate due process violation, and he should be permitted to pursue it (Petitioner's Brief 26). This is a distinctly different claim than the single claim on which the court below granted Lee a certificate of appealability, which was whether the denial of Lee's oral continuance motion violated his due process rights (JA 232).

Lee's "official interference" due process claim is nothing more than an attempt to revive his "prosecutorial misconduct" claim, Ground Three of his habeas petition (JA 155-156), which the district court found had been procedurally defaulted because Lee did not present it in his new trial motion or in his direct appeal (JA 213-16). The district court also denied Lee's request for an evidentiary hearing on how and why his would-be alibi witnesses left without testifying under 28 U.S.C. § 2254(e). Because Lee could have developed those facts before the trial court, and because the relevant information has been in the hands of Lee's own family members from the moment they walked out of the courthouse on the last day of the Lee's murder trial (JA 215),[15] the district court properly held that an evidentiary hearing was prohibited by 28 U.S.C. § 2254(e).[16] Both the district court and the court below refused to grant a certificate of appealability on the district court's disposition of Ground Three, or the denial of Lee's request for an evidentiary hearing. This Court should not permit Lee to circumvent the certificate of appealability process in this manner.

In any event, an evidentiary hearing on this claim would be a pointless act. Even if we assume as true the Habeas Version of the explanation for why Lee's would-be alibi witnesses left the courthouse, *i.e.*, a court officer told them to come back tomorrow, Lee's "prosecutorial misconduct" claim was defaulted long ago when he failed to include it in his new trial motion or his direct appeal. There

[15]Lee's argument that 28 U.S.C. § 2254(e) does not apply because he sought an evidentiary hearing in his post-conviction relief motion (Petitioner's Brief 27) must fail because the due process claim on which he sought the hearing is not cognizable in a post-conviction proceeding and the post-conviction court rejected the claim on that basis (JA 70).

[16]Lee's inability to meet either the due diligence requirement of 28 U.S.C. § 2254(e)(2), or the very high prejudice standard that section imposes, has already been addressed elsewhere in this brief.

are no grounds on which to excuse that default because there was no external "cause" for Lee's failure to include in his new trial motion a claim the predicate facts for which were in the hands of his family and could have been -- presumably would have been -- communicated to Lee or his counsel within hours of the end of Lee's trial. Moreover, "actual prejudice" cannot be shown for the same reasons as set out above. Regardless of why these witnesses left, only their alibi evidence would have been introduced at trial had the alleged constitutional error not occurred.

Lee also argues that this Court should remand for an evidentiary hearing "to determine why his witnesses left" as part of Lee's effort to establish "cause" for his procedural default of his due process claim relating to the denial of his oral motion for continuance (Petitioner's Brief 43). Lee is not entitled to an evidentiary hearing for that purpose because his witnesses' explanation for why they left could have no possible bearing on Lee's counsel's failure to abide by the Missouri Supreme Court Rules governing motions for continuance.[17] The material element of Lee's theory of cause -- already shown above to be inadequate -- was that the witnesses left suddenly, not why they left suddenly. An evidentiary hearing adds nothing to that claim nor renders Lee's inadequate assertion of cause suddenly an adequate one.

Finally, Lee claims he is entitled to an evidentiary hearing on the issue of his "actual innocence" under *Schlup*. Lee's failure to establish "probable actual innocence" as a gateway to obtaining federal review of his underlying due process claim is discussed at length above. An evidentiary hearing would add nothing to this. In evaluating whether Lee's alibi evidence constitutes new evidence of actual

[17]Lee admits this is true in his brief, in which he candidly remarks that "the reason for his witnesses' disappearance makes no difference to Lee's entitlement to relief, so long as that reason is not traceable to Lee or his counsel" (Petitioner's Brief 18).

innocence, it does not matter why Lee's would-be alibi witnesses left Lee's murder trial without testifying. That explanation, whatever it is, would not have been introduced in the murder trial and thus is not part of the "actual innocence" analysis, except insofar as the extreme delay between the disappearance of these witnesses and the first explanation for that disappearance may serve to damage the credibility of the alibi evidence they might give. Throughout Lee's habeas litigation, it has been presumed that his would-be alibi witnesses would have given the alibi testimony he claims for them. He does not need an evidentiary hearing now to prove what has always been presumed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

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REMON LEE,

Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTRODUCTION

This case is a testament to the degree to which, in the words of the dissent below, the Great Writ has become "a cascading web of confounding and labyrinthine procedural obstacles" that "has now virtually obscured the core purpose of the Writ." J.A. 253 (Bennett, C.J., dissenting). Alleging one procedural default after another, the state attempts to complicate a petition for habeas relief based on a striking, yet straightforward, denial of due process: the Missouri trial judge's refusal, because of his personal schedule, to grant a few hours' recess so that Remon Lee could locate his alibi witnesses, or to authorize court process to compel the appearance of these subpoenaed witnesses.

Although the state now suggests a raft of new—and we believe, meritless—procedural obstacles, both the Missouri Court of Appeals and the state in its Brief in Opposition in this Court relied on a single procedural default as grounds for rejecting Lee's due process claim: Lee's alleged failure to comply with Missouri Supreme Court Rules 24.09 and 24.10 in moving for a continuance. The absence of technical compliance with these rules is the only alleged procedural defect that may properly be considered at this stage, and this purported defect should be rejected under existing precedent because of the inadequacy of the state-law grounds.

I. MISSOURI SUPREME COURT RULES 24.09 AND 24.10 ARE NOT "ADEQUATE" TO BAR REVIEW OF LEE'S DUE PROCESS CLAIM.

A. The "Adequacy" Inquiry Is Designed to Protect Federal Constitutional Rights.

The state argues that the "adequacy" element of the doctrine "has served *only* the purpose of exposing subterfuges designed to frustrate federal review." Resp. Br. 10 (emphasis added). According to the state, the various tests this Court has formulated to determine the adequacy of asserted state-law grounds have been designed for the single purpose of ferreting

out rulings made in bad faith by state courts to frustrate the adjudication of federal claims. *Id.* at 19, 20, 34.

That is not so. This Court's decisions finding state-law procedural grounds inadequate do not turn upon a finding of subterfuge; indeed, such second-guessing of the motives of state-court judges in particular cases is neither feasible nor desirable. *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1161 (1986) (observing that determining whether a state-court procedural ruling is intended to evade a federal claim "poses obvious difficulties" and that "Supreme Court decisions do not purport to find evasion when holding state grounds inadequate"). Of course, principled tests established by this Court for determining when a state-law ground is adequate help root out those procedural grounds for decision that are little more than "legal fictions," Resp. Br. 19, but the adequacy element of the test serves additional important purposes. Chief among these is that of protecting federal rights.

This Court has long expressed wariness of state procedural rules that, whether or not applied in good faith, "prevent implementation of federal constitutional rights," *James v. Kentucky*, 466 U.S. 341, 348-49 (1984), or undermine this Court's ability to maintain uniformity in the interpretation of federal rights and claims. *See, e.g., Brown v. Western Ry.*, 338 U.S. 294, 299 (1949) ("Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."); *Davis v. Wechsler*, 263 U.S. 22, 25 (1923) (emphasizing that "local practice shall not be allowed to put unreasonable obstacles in the way" of the enforcement of constitutional norms). Indeed, as even the state's amicus concedes: "Conscious hostility is not the only danger to federal rights . . . . Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case." Criminal Justice Legal Foundation Br. 11. The Missouri courts applied

Rules 24.09 and 24.10 in precisely such an unfair manner here.

B. Missouri Supreme Court Rules 24.09 and 24.10 Have Not Been Regularly Enforced.

The state does not dispute that Missouri courts often reach the merits in reviewing denials of procedurally defective motions for continuances. *See* Pet. Br. 31-33 & nn. 12-13 (citing cases).[1] It argues nonetheless that a state procedural ground cannot be found to be inadequate for inconsistent application in the absence of decisions in which the state courts have reversed on the merits, despite the default. Resp. Br. 11, 24, 26. This argument fundamentally misunderstands the "firmly established and regularly followed" inquiry. There are myriad reasons why a state court considering a denial of a continuance may not find a state-law abuse of discretion or denial of federal due process rights, none of which has anything to do with enforcing state procedural rules governing the manner in which the motion must be made. Cases in which a denial of a continuance rises to the level of reversible error or a due process violation are relatively infrequent. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) ("[I]t is not every denial of a request for more time that violates due process . . . .").

Indeed, this Court's cases confirm the irrelevance to the adequacy inquiry of the actual *outcome* of state-court decisions that ignore procedural defaults. In *Barr v. City of Columbia*, 378 U.S. 146, 149 & n.4 (1964), for example, this Court found that South Carolina's rule regarding the adequacy of exceptions made below was not "strictly or regularly followed" in part because in three previous cases, the state courts had considered "these same exceptions enough to raise the question of

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[1] The state argues that these rules have been established "for decades." Resp. Br. 25. In fact, the Missouri courts routinely overlooked failures to comply with Rule 25.08, the predecessor to Rules 24.09 and 24.10, as well. *See, e.g., Missouri v. Shryock*, 593 S.W.2d 906, 908 (Mo. Ct. App. 1980); *Missouri v. Goodman*, 531 S.W.2d 777, 779 (Mo. Ct. App. 1975); *Missouri v. Martin*, 525 S.W.2d 804, 808 (Mo. Ct. App. 1975); *Missouri v. Roberts*, 506 S.W.2d 817, 818 (Mo. Ct. App. 1974).

sufficiency of evidence," even though two of these cases nonetheless affirmed the convictions. Similarly, in *Caldwell v. Mississippi*, 472 U.S. 320, 328 (1985), this Court cited a previous Mississippi decision that had explicitly *rejected* a defendant's claims on the merits rather than rely on a procedural bar, as evidence of the lack of a similar procedural default in Caldwell's own case. *See also Harris v. Reed*, 489 U.S. 255, 278-79 (1989) (Kennedy, J., dissenting) (noting that *Caldwell* recognized that "Mississippi had not consistently applied its procedural bar to capital cases").

In any event, Missouri courts have reversed denials of continuances when the motions were procedurally defective—typically in circumstances, such as these, where the need for the continuance was based on surprise or a lack of opportunity to present a claim to the trial court.[2] *See, e.g., Missouri v. Whitfield*, 837 S.W.2d 503, 508 (Mo. 1992) (reversing trial court's failure to grant apparently oral request for a continuance to examine a coat after its "surprise introduction" at trial); *Missouri v. Childers*, 852 S.W.2d 390, 391-92 (Mo. Ct. App. 1993) (reversing denial of apparently oral continuance request after late production of discovery by the prosecution); *see also Anderson v. Anderson*, 669 S.W.2d

[2] None of the Missouri cases the state cites at Resp. Br. 25-26 involved subpoenaed witnesses who vanished immediately before they were testify, rendering technical compliance with the procedural rules governing continuance impracticable. Indeed, several involved witnesses who were not subpoenaed or whose absence was known for days before trial. *See, e.g., Missouri v. Scott*, 487 S.W.2d 528, 530 (Mo. 1972) (missing witness had not been subpoenaed); *Missouri v. Settle*, 670 S.W.2d 7, 13 (Mo. Ct. App. 1984) (defective motion for continuance filed six days before trial). In general, motions for continuances made on the eve, or even the morning, of trial can be prepared in compliance with Rules 24.09 and 24.10. Thus, for example, the fact that the defendants prepared defective written motions for continuances in *Missouri v. Cuckovich*, 485 S.W.2d 16, 21 (Mo. 1972), and *Missouri v. Freeman*, 702 S.W.2d 869, 873-74 (Mo. Ct. App. 1985), shows that they had the opportunity to prepare motions that would have complied with the procedural rules. At any rate, the fact remains that the Missouri courts have been erratic in their enforcement of these rules.

624, 625 (Mo. Ct. App. 1984) (per curiam) (reversing denial of oral motion for a continuance in a civil case because appellant "had had very little opportunity to get an attorney who could even present his application for continuance in the regular way prescribed by Supreme Court Rule 65.03" [the civil analog to Rule 24.09]); *Missouri v. Minnix*, 503 S.W.2d 70, 72-74 (Mo. Ct. App. 1973) (reversing denial of oral motion for a continuance on morning of trial to allow counsel time to file a formal motion regarding the defendant's mental capacity).[3]

C. The State Has No Legitimate Interest in Applying Rules 24.09 and 24.10 Here.

The state's defense of Lee's purported procedural default is based on the untenable proposition that when defense counsel discovered after the lunch recess that Lee's alibi witnesses had suddenly vanished, he was required not only to make a written motion for a continuance with an affidavit, but to inform the trial court as to precisely where the witnesses had gone and when they would be available—even though he was allowed no time to make any inquiry. The state attempts to recast Lee's argument that the rules are inadequate as one that would require a "radical change of direction" in the independent and adequate state ground doctrine. Resp. Br. 10; *see also id.* at 32-34. Again, this is not so. Lee does not contend that this Court must engage in ad hoc balancing of the state's interests against countervailing federal interests in order to determine whether Rules 24.09 and 24.10 are adequate. Rather, Lee argues on the basis of existing precedents that the circumstances of the particular case bear on whether a state's procedural rule serves a legitimate purpose. Here, no

[3] For additional cases in which the Missouri appellate courts reversed denials of what were apparently oral requests for continuances, where the last-minute disclosure of evidence by the state unfairly surprised the defense, see *Missouri v. Blake*, 620 S.W.2d 359, 360-61 (Mo. 1981); *Missouri v. Varner*, 837 S.W.2d 44, 45-46 (Mo. Ct. App. 1992); *Missouri v. Perkins*, 710 S.W.2d 889, 891-94 (Mo. Ct. App. 1986); *Missouri v. McIntosh*, 673 S.W.2d 53, 54-55 (Mo. Ct. App. 1984).

legitimate state interest is served by finding that Lee defaulted his due process claim when he substantially complied with both rules in circumstances in which literal compliance was unrealistic, if not impossible.

This Court's cases regarding the adequacy of purported state procedural grounds are not so rigid and unforgiving as the state suggests. On a number of occasions, this Court has found that a state rule or procedure "would further no perceivable state interest," *James*, 466 U.S. at 349, without deciding whether that rule or procedure would *always* be inadequate. As the Court recognized in *Michel v. Louisiana*, 350 U.S. 91 (1955), although a procedure "on its face" may be legitimate, *id.* at 93, "in the circumstances of a particular case, the application of such a rule may not give a reasonable opportunity to raise the federal question." *Id.* at 95; *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 245 (1969) (Harlan, J., dissenting) (state procedural ground inadequate because, "although [the rule] itself may not be novel, the standard implicitly governing the rule's application to the facts here was"); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930); Richard H. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 577 (4th ed. 1996) ("Supreme Court review plainly cannot be foreclosed by a litigant's noncompliance with a state procedural rule that, on its face or as applied, violates the Due Process Clause."). In such circumstances, this Court has recognized, the state's interest "must bow to essential considerations of fairness to individual defendants." *Michel*, 350 U.S. at 98; *accord Reece v. Georgia*, 350 U.S. 85, 89 (1955) (state rule regarding the timing of objections to a grand jury was inadequate where it was "utterly unrealistic" to say that the defendant had an opportunity to object).

Thus, in *Ford v. Georgia*, 498 U.S. 411 (1991), the Court acknowledged that Georgia's requirement that a *Batson* claim be raised between the selection of jurors and the administration of their oaths was "a sensible rule," *id.* at 422, but nonetheless analyzed whether the rule was adequate to bar the claim "in

this case." *Id.* at 423. Similarly, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court had no quarrel with Ohio's rule that a defendant must preserve challenges to jury instructions by objecting to them when given. *See id.* at 123. Despite the defendant's failure to object to the absence of a lewdness instruction and thus to "follow[] the precise procedure" required, *id.* at 125, this Court nevertheless held that it could consider his constitutional claim. The Court noted that the trial was "brief," that the defense had moved to dismiss the case before trial, and that "*under the circumstances*, nothing would be gained by requiring [the defendant's] lawyer to object a second time, specifically to the jury instructions." *Id.* at 124 (emphasis added).

Likewise, "nothing would be gained" by requiring Lee to file a written motion with an affidavit, as required by Rule 24.09, or to make a more extensive proffer regarding the witnesses' absence, under Rule 24.10. *See* Pet. Br. 37-38 (arguing that Lee satisfied each element required under Rule 24.10). What is remarkable about the position of the state is how far it strays from the realities of the situation. Lee was to present his alibi witnesses after the lunch recess on Thursday, February 24, the last day of trial. The afternoon session resumed, and Lee's counsel immediately put his client on the stand to make a record regarding the alibi witnesses' sudden disappearance from the witness room where they had waited all morning. J.A. 15-22. After the trial court denied the motion, closing arguments were made to the jury, the case was submitted, and the jury delivered its verdict—all that same afternoon. There was no opportunity for Lee to file a written motion with an affidavit (although testimony by a defendant in open court under oath and subject to cross-examination is surely a superior form of proof to an affidavit signed by the defendant or his counsel).

Counsel requested an overnight continuance to attempt to locate the witnesses, J.A. 20; Lee personally asked for only a couple hours' recess. J.A. 18. The trial court allowed no time at all to attempt to locate the witnesses; to determine where,

when, or why they had left; to prepare a written (and better informed) motion for a continuance; or to use any court process whatsoever to bring the witnesses to the courthouse—despite the fact that these witnesses were under subpoena. J.A. 18, 20-21. The testimony of Lee and the representations of counsel, an officer of the court, amply establish that the witnesses were absent without Lee's consent. *See* Rule 24.10(d). Counsel asked the trial court for "capiases" for the witnesses, but the court again refused. J.A. 18, 20. Yet this Court's cases "establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (citation omitted).

The state faults Lee for failing to provide "an assurance" that the witnesses would be at the address that counsel provided to the trial court. J.A. 20; *see* Resp. Br. 31. But that is not the test for enforcement of a subpoena; nor can a defendant be expected to provide an absolute guarantee under Rule 24.10 that a missing witness will be located at a particular time and place. Obviously, the defense could do no more than represent to the court where Lee's witnesses were staying and that there were reasonable grounds for believing that they could readily be located, as required by Rule 24.10(b), because they planned to remain in the city for a religious event. J.A. 18. If Lee had been able to supply a written motion with an affidavit at that moment, it could have said nothing more.

The state also claims, *see* Resp. Br. 36, that Lee failed to demonstrate either the materiality of, or the particular facts that would be established by, the witnesses' testimony, as required by Rule 24.10(a) and (c), because he did not repeat at length the detailed explanation of the alibi witnesses' expected testimony that he had provided in his opening statement and during voir dire, J.A. 10-13, although Lee reminded the trial court that the missing witnesses were his family members from California. J.A. 16. The state posits an uninformed and

mystified trial court struggling to remember "the required information by review of the entire record," an enterprise it deemed "questionable at best." Resp. Br. 31; *see also id.* at 14.

The state's argument is disingenuous. This was not a months' long antitrust case, but a short trial in which the *only* issue was whether the eyewitnesses had correctly identified Lee as the driver of the get-away truck, or whether, instead, he was in California at the time. The presentation of evidence took little more than one day, from February 23 to 24. The defense opening statement, which outlined the expected testimony of the alibi witnesses, was given on Wednesday, February 23, *one* day before the witnesses' disappearance. J.A. 12-13; *cf. Osborne*, 495 U.S. at 123 (constitutional challenge to jury instruction preserved by pre-trial motion in part because defendant's "trial was brief"). Rule 25.05(A)(5) requires that, upon request, the defense provide the state notice of its intent to offer an alibi defense. That notice evidently was provided because the prosecutor discussed the anticipated alibi defense in her opening statement. Tr. 187. The prosecutor obviously appreciated the witnesses' significance, as she took pains to exploit their absence in her closing argument. J.A. 27. In short, there was no question who these witnesses were or why they were important: They were Lee's entire defense.

Nor is it true that "we do not know precisely what facts the trial court considered" when it denied the continuance. Resp. Br. 13. The trial court spelled out its reasons for rejecting the motion for the record. The first thing the trial judge said after counsel proposed a continuance until the next morning was this: "Friday. And my daughter is going to be in the hospital all day. . . . So I've got to stay with her." J.A. 20. The first thing the trial judge said after counsel proposed Monday as an alternative was this: "I've got another case set for trial that will take a week starting Monday morning. I'm not in a position to grant a continuance under these circumstances." J.A. 22. These are not even remotely defensible reasons for denying a defendant a chance to rebut a first-degree murder charge.

It is particularly anomalous to find a procedural default in

these circumstances when Rules 24.09 and 24.10 were designed *not* to protect the integrity of the appellate process, but, as the state put it, "to enhance the reliability of a *trial court's* determination" of whether to delay a trial because of the absence of a witness. Resp. Br. 29 (emphasis added); *cf. Ortega-Rodriguez v. United States*, 507 U.S. 234, 246 (1993) (holding it improper for the court of appeals to sanction a defendant by dismissing his appeal when his transgression flouted only the authority of the district court, which "has the authority to defend its own dignity," and had "no connection" to the appellate process). Here the trial court denied the motion *on the merits*; the court never suggested that the motion was defective in form or that the court lacked sufficient information about the importance of the witnesses' testimony. And the prosecutor neither objected to the requested continuance itself or the form of the motion, nor chose to cross-examine Lee. The state did not even argue in its brief on appeal that Lee had failed to comply with Rule 24.09. J.A. 110-15. This sequence of events suggests that it was the state, not the defense, that engaged in sandbagging by waiting until the appeal to suggest that Lee's motion for continuance was procedurally deficient.

Apparently recognizing that withholding a reasonable opportunity to comply with Rules 24.09 and 24.10 would itself deny Lee due process, the state is reduced to arguing that Lee's counsel could have written out a motion for a continuance and an affidavit in longhand in the courtroom. Resp. Br. 30, 36. It is difficult to see when or how counsel could have done even that much, for as soon as the afternoon session commenced, he was before the trial court arguing for a continuance. The likelihood that the trial court would have granted counsel a brief continuance to write out a motion and affidavit on a legal pad, when the court would not allow the defense a continuance to attempt to track down its witnesses, is surely remote. The trial was concluded that same day, leaving counsel no opportunity to prepare a written motion, or any reason for doing so. And even if counsel could have scribbled out a motion and affidavit in longhand (leaving aside the question of

notarization), what purpose would that have served? A handwritten motion in such circumstances would have been perfunctory at best, certainly offering the trial court nothing more than what was conveyed orally. This Court has frowned on such pointless exaltations of form over substance. *See* Pet. Br. 39-40 & n.16 (citing examples).

In sum, Rules 24.09 and 24.10 are inadequate to preclude consideration of Lee's due process claim, and the case should be remanded for consideration of that claim.[4]

II. EVEN IF LEE'S DUE PROCESS CLAIM IS PROCEDURALLY BARRED, HE HAS SHOWN "CAUSE" AND "PREJUDICE" OR, IN THE ALTERNATIVE, "ACTUAL INNOCENCE."

A. "Cause" and "Prejudice"

1. Cause. The state contends that despite the exceptional circumstances that led to Lee's failure to comply with one or both of Rules 24.09 and 24.10, Lee cannot show "cause" for any procedural default. Its strenuous resistance to a finding of "cause" is ironic because it acknowledges that the "cause and prejudice" exception is available as a backstop "to prevent a miscarriage of justice in the extraordinary case." Resp. Br. 33. This is such a case.

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[4] In two footnotes, Resp. Br. 16 n.2, 32 n.7, the state contends that Lee did not fairly present his federal due process claim to the Missouri courts. The state did not make this argument in either its Brief in Opposition or even in its brief on appeal to the Eighth Circuit; the argument is therefore waived. *See* Supreme Ct. R. 15.2; *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985); Robert L. Stern et al., *Supreme Court Practice* § 6.37, at 370 (7th ed. 1993). The point, in any case, is meritless. Lee explicitly argued on direct appeal that the trial court's denial of a continuance deprived him of his rights to due process of law and present witnesses in his defense as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution. J.A. 87, 90; *see also* J.A. 91, 92, 94, 95. Without question, this issue, which was preserved in the motion for new trial, *see* J.A. 31-32, was fairly presented to the Missouri Court of Appeals. *See Trevino v. Texas*, 503 U.S. 562, 567 (1992) (per curiam).

First, the state misses the point when it argues that the alibi witnesses' disappearance gave rise to the need for the continuance, but was not "cause" for any procedural default. Resp. Br. 36. The existence of cause turns on whether "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In this instance, the *suddenness* of the witnesses' departure both generated the need for the continuance *and* impeded counsel's ability to comply literally with Rules 24.09 and 24.10. As for *why* the witnesses left, Lee agrees with the state, Resp. Br. 37, 49, that whether a court officer, employee of the prosecutor's office, or any other agent of the state told the witnesses they could leave adds nothing in terms of causation to this impediment to full compliance with the rules: It was the witnesses' disappearance *without warning* that proximately caused any failure to comply with the rules. The key point is that Lee is blameless for the witnesses' disappearance—whatever the reason for their departure.

The state does not accept Lee's contention that the witnesses left for reasons external to the defense, however; it insinuates that his family members left not because of what a state official told them, but because they did not want to perjure themselves on Lee's behalf. Resp. Br. 37. Nothing in the record bears out this invention by the state. The state cites inconsequential inconsistencies between Lee's amended motion for postconviction relief and the affidavits submitted with his federal habeas petition in an effort to suggest that Lee's explanation for his witnesses' disappearance is not believable. Resp. Br. 6-7, 38 & n.9. It is unimportant that in his amended Rule 29.15 motion Lee refers to "an unknown person," believed to be employed by the prosecutor's office, who told the witnesses they could leave, J.A. 56, 58, whereas in their federal affidavits, Minister James and Gladys Edwards refer to that person as an "officer of the court." J.A. 172, 174. Nor is it significant that Lee's pro se federal habeas petition assumes that the court official did so at the behest of a

prosecutor bent on tricking the witnesses, J.A. 155-56, whereas the amended Rule 29.15 motion makes no judgment as to whether the official acted in good faith or bad. J.A. 56-58. The difference in "spin" reflects only the difference between counseled and uncounseled pleadings.[5]

The core allegation—that a state official, whom Lee cannot identify, told the witnesses that they could leave because their testimony was not needed at that time—has remained unchanged. Minister Edwards's sworn explanation seems by far the more plausible account: "[W]e were told by an officer of the court that [o]ur testimony would not be needed until the following day, we were excused until then. We *did not travel from California to abandon the boy*, we came to testify." J.A. 174. Because Lee requested, but was wrongly denied, the opportunity to develop this claim in state court, he is now entitled to an evidentiary hearing in federal court to establish the reason for his witnesses' disappearance. *See* Pet. Br. 26-29, 43.[6]

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[5] It also means nothing that the state rested its case at 10 a.m., while counsel estimated that the witnesses left the courthouse at 11 a.m. *See* Resp. Br. 7. Defense counsel did not actually know when the witnesses left. But even if they left at 11 a.m., that does not mean their departure was not the result of a representation by a state official. The official could have talked to the witnesses before the state rested, there could have been a misunderstanding regarding the status of proceedings, or the official could have acted in bad faith. Because the witnesses were barred from the courtroom, there is no reason that *they* would have known when the state rested its case.

[6] Although one question presented in the Petition for Certiorari concerned whether an evidentiary hearing should be held to consider the alibi witnesses' contention that they were told by a court official to leave, the state waited until its merits brief to suggest that this question is not properly before the Court because the issue is outside the scope of the Eighth Circuit's certificate of appealability. Resp. Br. 47-48. The argument is waived for failure to include it in the state's Brief in Opposition filed in this Court. *See* note 4, *supra*. In any case, the point is meritless because the question of why the witnesses left is intertwined with the due process issue on which the Eighth Circuit granted the certificate.

Second, the state maintains that Lee defaulted this claim (whether considered as an additional constitutional claim or as "cause") by offering an explanation for his witnesses' disappearance at the postconviction stage, rather than in his motion for new trial. Resp. Br. 2, 37-39. With the exception of claims of ineffective assistance of counsel, *see Edwards v. Carpenter*, 529 U.S. 446 (2000), this Court has never held that "cause"—the existence of which presents a question of federal law, *Carrier*, 477 U.S. at 489—must be exhausted in state court. More importantly, the state does not deny that Lee presented the claim to the postconviction motion court, but argues instead that the claim was not cognizable at the postconviction stage. Resp. Br. 38. The argument is yet another groundless procedural snare the state attempts to set for Lee. It was entirely appropriate under Missouri law for Lee to allege at the postconviction stage that the state had interfered with his witnesses, a claim based on facts outside the four corners of the trial transcript. The state cites no authority that would have required Lee to raise such a claim in a motion for new trial and then in the direct appeal portion of his consolidated brief on appeal.

In fact, the weight of authority suggests that this type of claim is properly raised in a Rule 29.15 motion. The closest analogies to a due process claim based on state interference with the defense are claims that the prosecution suborned perjury or withheld exculpatory evidence subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963). Such claims are routinely considered in Missouri at the postconviction stage. *See, e.g., Kern v. Missouri*, 507 S.W.2d 8, 12-13 (Mo. 1974); *Buck v. Missouri*, No. ED75218, 2000 WL 754367 (Mo. Ct. App. June 13, 2000); *Missouri v. Kelley*, 953 S.W.2d 73, 91-93 (Mo. Ct. App. 1997); *Missouri v. Arndt*, 881 S.W.2d 634, 637-38 (Mo. Ct. App. 1994); *Missouri v. Larner*, 844 S.W.2d 490, 493 (Mo. Ct. App. 1992); *DeClue v. Missouri*, 579 S.W.2d 158, 159 (Mo. Ct. App. 1979). Indeed, in *Ray v. Missouri*, 644 S.W.2d 663 (Mo. Ct. App. 1982), the Missouri court reversed the denial of an evidentiary hearing at the

postconviction stage where the defendant had alleged that the state suborned perjury—despite the fact that the court had previously refused to hear the same claim on direct appeal because the matter had not been presented in the motion for new trial. *Id.* at 666 n.3; *see also Missouri v. Ray*, 600 S.W.2d 70, 74-75 (Mo. Ct. App. 1980) (direct appeal).

Finally, the state, which understood that Lee was advancing a due process claim in his Rule 29.15 motion based on the alleged state interference with his witnesses, *see* App. C, at 11a ¶ 2, did not then argue that the claim was not cognizable because it should have been presented in the motion for new trial. *See* App. C, at 12a-13a. Furthermore, neither the postconviction court nor the Missouri Court of Appeals found a procedural default in Lee's presentation of this claim. Nonetheless, the state claims that the postconviction court agreed that Lee's claim based on the state's alleged interference with his witnesses was not cognizable because it should have been raised on direct appeal. Resp. Br. 38. Not only had Lee's direct appeal, which was consolidated with his postconviction appeal, not yet been filed, but, more importantly, in paragraph 4 on J.A. 70, to which the state refers, the postconviction court was addressing only Lee's claim that he was denied due process when the trial court denied him a continuance. *That* claim, which Lee raised in his motion for new trial and on direct appeal, *see* note 4, *supra*, was indeed based on trial error, and so the postconviction court did not address it. As indicated in paragraph 3 on J.A. 69-70, however, the postconviction court rejected *on the merits* Lee's claim regarding the state's interference with Lee's witnesses—a claim that was not based on trial error—and refused to hold an evidentiary hearing. J.A. 75. Likewise, the Missouri Court of Appeals found no procedural default regarding the manner in which Lee requested an evidentiary hearing or any deficiency in the motion for new trial, but affirmed the denial of a hearing on the merits. J.A. 131. There can be no procedural default for purposes of federal habeas review, unless "the state court . . . actually . . . relied on the

procedural bar as an independent basis for its disposition of the case." *Harris,* 489 U.S. at 261-62 (citation omitted).

2. Prejudice. Arguing again for a change in the law, the state urges this Court to adopt a new standard for actual prejudice that is more stringent than any standard this Court has previously imposed; it then contends that Lee cannot meet this as-yet unarticulated standard because family members serving as alibi witnesses stand no chance of persuading a jury of Lee's innocence when stacked up against eyewitness testimony. In a first-degree murder case in which the state's proof of guilt is just barely legally sufficient and the defendant has been deprived of his right to present a defense, the selection of a standard for prejudice is unlikely to be dispositive. Nevertheless, this Court's precedents establish that the proper standard for actual prejudice where there has been a procedural default is no higher than that of materiality for *Brady* violations, *see United States v. Bagley,* 473 U.S. 667, 682 (1985), or prejudice for purposes of establishing ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 694 (1984)—that "there is a reasonable probability" that but for the error, "the result of the proceeding would have been different." *See Strickler v. Greene,* 527 U.S. 263, 282 (1999) (equating the actual prejudice and *Brady* materiality standards); *accord id.* at 297 n.2 (Souter, J., dissenting); *Schlup v. Delo,* 513 U.S. 298, 327 & n.45 (1995); *Sawyer v. Whitley,* 505 U.S. 333, 345 (1992). Lee plainly meets this standard. *See* Pet. Br. 43-45.

In essence, the state asks this Court to presume that eyewitness testimony, no matter how flawed, is inherently more worthy of credence than that of family members offering an alibi. That assumption flies in the face of the burgeoning literature regarding the unreliability of eyewitness testimony. As one recent study of 86 persons legally exonerated after being sentenced to death concludes: "Erroneous eyewitness testimony—whether offered in good faith or perjured—no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system." Rob Warden, Center on

Wrongful Convictions, Northwestern University School of Law, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row* (May 2, 2001), *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/eyewitnessstudy.htm; *see also* Pet. Br. 44 & n.17. When a defendant attempts to establish a mistaken eyewitness identification, he is forced to prove a negative. A defendant typically does so by attacking the accuracy of the identification and showing that he was somewhere else at the time of the crime. Invariably, alibi testimony will be provided by those who know the defendant: his friends and family.

That the jury may still have chosen to believe the state's eyewitnesses if Lee had presented his alibi defense, does not negate Lee's showing of prejudice. There will always be a possibility of conviction if the state's case is legally sufficient. The test is "not whether the defendant more likely than not would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler,* 527 U.S. at 289-90 (citation omitted). Lee need show only a "reasonable probability," or, to put it another way, a "significant possibility," *id.* at 297 (Souter, J., dissenting), that the outcome would have been different with his alibi testimony. His evidence, if presented, would have thrown the outcome of the case in doubt; hence, the verdict merits no confidence at all.

Finally, the trial court's denial of a continuance was prejudicial not only because it deprived Lee of his fundamental right to present a defense, but because it transformed the witnesses' sudden disappearance into affirmative evidence of guilt for the prosecution, irreparably tainting the trial. The prosecution capitalized on its windfall by arguing in closing to the jury that the failure of the promised alibi defense to materialize demonstrated that Lee was in Kansas City at the time of the crime. J.A. 27. The defense, by contrast, given no time by the trial court to investigate, could do nothing more than apologize awkwardly to the jury for failing to keep its

promise to put on an alibi defense. J.A. 26. The jury's conclusion that the eyewitnesses had identified the right man after all was a foregone conclusion. Even if the standard for prejudice were higher, Lee would meet it.

B. Actual Innocence

The state asserts that Lee cannot show actual innocence, as an alternative to cause and prejudice, first, because the alibi testimony was not "new," and second, because the jury could have chosen to believe the state's witnesses over Lee's alibi witnesses, had the latter testified. Resp. Br. 42-44.

Lee addressed the first argument in his opening brief. Pet. Br. 46-49. As for the second, that the jury *could* choose to accept the word of the state's eyewitnesses over the word of Lee's family members does not undermine Lee's showing of actual innocence, any more than it negates his showing of prejudice. The *Schlup* standard for actual innocence does not turn on whether the state's evidence, if credited, is sufficient, but on a prediction of what jurors would be likely to do. *Schlup*, 513 U.S. at 330. When, as here, the new evidence proffered by the defendant "call[s] into question the credibility of witnesses presented at trial," *id.*, that conflict in the evidence does not mean that the *Schlup* standard has not been met; it simply means that "the habeas court may have to make some credibility assessments." *Id.* In other words, if, after conducting a hearing, the district court concludes that Lee's family members are credible regarding the alibi, then the court would have no choice but to conclude that no reasonable juror would have convicted Lee beyond a reasonable doubt in light of the new evidence. *See id.* at 327.

III. THE TRIAL COURT DENIED LEE DUE PROCESS, AND 28 U.S.C. § 2254(d) DOES NOT LIMIT HIS ACCESS TO HABEAS RELIEF.

The state contends that the federal courts are powerless to rectify the injustice done Lee in this case because the Missouri Court of Appeals, in an alternative holding, allegedly rejected

Lee's federal due process claim on the merits. That holding, the state argues, is "presumed correct" under 28 U.S.C. § 2254(d). Resp. Br. 10, 44. This contention is flawed for several reasons.

First, section 2254(d) does not confer a presumption of correctness on state-court adjudications of federal claims. The provision is simply a restriction on the availability of federal habeas relief. *(Terry) Williams v. Taylor*, 529 U.S. 362, 399 (2000) (O'Connor, J., concurring). The section 2254(d) analysis is therefore premature at this stage.

Second, the Missouri Court of Appeals undertook no federal due process analysis whatsoever in rejecting Lee's direct appeal.[7] At most, the state appellate court considered a claim under state law that the trial court abused its discretion in denying a continuance. J.A. 128. In the absence of an adjudication of the merits of Lee's federal claim, the standards of section 2254(d)(1) do not apply.

Even if the state court's alternative holding were treated as a disposition of Lee's federal due process claim, the only merits issue that the Missouri Court of Appeals even arguably addressed was the question of prejudice. The state court *assumed* an abuse of discretion, but then found that Lee failed to establish prejudice. J.A. 128. This treatment of Lee's due process claim resulted in a decision that was "contrary to this Court's precedent," *Williams*, 529 U.S. at 405, because if the state court had actually found a violation of due process, then it would have been required, under this Court's cases, to have determined whether this constitutional error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). *See Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (remanding for a harmless-error analysis after finding

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[7] In arguing that "because the Missouri Court of Appeals made no plain statement to the contrary, it should be presumed that the court was performing a federal law analysis," Resp. Br. 44, the state contradicts its earlier position that Lee did not present his federal due process claim to that court. Resp. Br. 16 n.2, 32 n.7. The state cannot have it both ways.

a violation of the right to present a defense); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (applying a *Chapman* harmless-error analysis to a Confrontation Clause violation).[8] Indeed, the consequences of such a due process violation are so dire for the defendant that in cases involving a denial of the right to present a defense, this Court has reversed without even discussing harmless error. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). That the Missouri Court of Appeals applied a heightened standard of prejudice, *see* J.A. 128 ("[A]ppellant has the burden of showing that the testimony of the absent witnesses was so crucial that it is reasonably probable a different outcome would have resulted."), one that "contradicts the governing law set forth" in this Court's cases, *Williams*, 529 U.S. at 405, only reinforces the conclusion that the state court did not, in fact, adjudicate a federal due process claim.

* * *

As a result of the trial court's arbitrary denial of a brief continuance here, a man who has protested his innocence from the beginning has been left to languish for the rest of his life in prison. If federal habeas corpus has "retain[ed] the 'ability to cut through barriers of form and procedural mazes,'" *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973) (quoting *Harris v. Nelson*, 394 U.S. 286, 291 (1969)), then there can be no doubt but that Lee is entitled to a new trial.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court reverse the judgment of the court of appeals.

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[8] The state is wrong to suggest that the *Brady/Strickland* formulation of prejudice generally applies to *preserved* due process claims on direct review. Resp. Br. 40. A *Brady* claim is a particular species of due process violation in which the materiality of the withheld exculpatory evidence is a required element of the violation itself.

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In the
Supreme Court of the United States

REMON LEE,
Petitioner,

v.

MICHAEL KEMNA,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF THE STATES OF NEBRASKA, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, GEORGIA, KANSAS, MARYLAND, MISSISSIPPI, MONTANA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether petitioner's violation of Missouri Supreme Court Rule 24.10 is an adequate and independent state law ground to support the judgment of the Missouri Court of Appeals and bar federal habeas review of his claim.

2. If so, whether petitioner's violation of the rule can be excused by a showing of "cause" and "prejudice" or a "fundamental miscarriage of justice."

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INTEREST OF THE AMICI CURIAE

This case presents two basic questions: First, whether petitioner's violation of Missouri Supreme Court Rule 24.10 is an adequate and independent state law ground to support the judgment of the Missouri Court of Appeals. Second, if so, whether petitioner's violation can be excused. The Court's resolution of these questions could significantly affect the disposition of habeas corpus petitions in many states. Procedural rules such as Rule 24.10 are common and are necessary to effectively run the judicial process. It is important to the amici states that this Court reaffirm that state procedural rules may not be bypassed by defendants and will be respected by the federal courts. An expansion of the types of state rules deemed inadequate for procedural bar purposes would impede the justice system's interest in obtaining finality of criminal convictions and would contravene the federalism principles that underlie the adequate and independent state ground doctrine.

STATEMENT OF THE CASE

Amici adopt and incorporate the Statement of the Case set forth in the Brief for Respondent. Because petitioner Remon Lee's request for a continuance is at the heart of this case, this Statement supplements respondent's by providing additional detail regarding that application.

On Thursday, February 24, 1994, the state rested its case and Lee began putting on his defense. James McMullin, Lee's counsel, requested a hearing to make it clear that Lee was aware of his right to testify but was waiving that right. During this hearing, Lee stated that his mother, step-father and sister had come from California to testify, were present at the

courthouse at 8:30 a.m., but could not be found by 11:00 a.m. J.A. 16-18. McMullin then stated: "All I can do is proceed without them and do the best I can. Do you understand?" J.A. 18. After Lee said that he did, McMullin asked whether there was anything Lee wanted McMullin to do. Lee responded by asking whether they could obtain a short continuance and attempt to locate the missing witnesses "because it's very valuable to my case." This apparently surprised McMullin, who responded that he "suppose[d] we could ask for a capias, and—but if they're from California I don't know. Anyway— ." J.A. 18.

After Lee's testimony, the court asked McMullin whether he intended to request a continuance. McMullin stated that "[h]e's asked for one, Judge. I think I better ask for a continuance on the thing." J.A. 20. McMullin proceeded to request a continuance until the following morning. The trial judge informed the parties that he would not be available then because his daughter was going to be in the hospital. J.A. 20. After a further exchange, the trial court denied the motion for a continuance, finding that it appeared the witnesses had abandoned Lee. McMullin then suggested that the trial court continue the matter until Monday. The trial court rejected this as well, stating: "I've got another case set for trial that will take a week starting Monday morning. I'm not in a position to grant a continuance under these circumstances. The folks were here today. They were seen here on this floor of the courthouse, and they apparently simply have abandoned . . . the defendant." J.A. 22. During the course of this hearing, neither Lee nor his attorney mentioned why the witnesses were necessary, what facts they would testify to, or the materiality of the

evidence sought to be obtained by the witnesses. Nor did they provide any explanation for the witnesses' departure. J.A. 15-25.

Following an unsuccessful motion for a new trial and application for post-conviction relief, Lee appealed to the Missouri Court of Appeals. The court stated that "the trial court could have properly denied the motion for a failure to comply with [Missouri Supreme Court] Rule 24.09," which requires that applications for continuances be made in writing. J.A. 127. The court then assumed *arguendo* that the oral motion was proper, and ruled that the trial court did not abuse its discretion by denying the continuance request because the request failed to comply with Missouri Supreme Court Rule 24.10. That rule sets forth what "[a]n application for a continuance on account of the absence of witnesses or their evidence shall show." The court found that Lee's "motion was made without the factual showing required by Rule 24.10," and that "[w]hen a denial to grant a motion for continuance is based on a deficient application, it does not constitute an abuse of discretion." J.A. 127.

Lee next filed a habeas corpus petition in the United States District Court for the Western District of Missouri. The district court rejected all seven of the claims raised by Lee. Of pertinence here, the district court concluded that Lee's due process claim based on the trial court's failure to grant a continuance was not "fairly presented" to the Missouri courts because Lee had failed to comply with Rule 24.10. J.A. 217; Pet. App. B-5.

The Eighth Circuit affirmed, holding that Lee had procedurally defaulted his claim because the Missouri Court of Appeals rested its decision on a state ground

(non-compliance with Rules 24.09 and 24.10) that was independent of the federal question and adequate to support the judgment. J.A. 234; Pet. App. A-2. The court further ruled that Lee could demonstrate neither cause and prejudice nor actual innocence to excuse his default. J.A. 234-35; Pet. App. A-2 to -3.

SUMMARY OF ARGUMENT

Missouri Supreme Court Rule 24.10 provides that an application for a continuance on account of the absence of witnesses must show (through affidavit) an array of facts regarding the need for the continuance and its likely efficacy. Missouri appellate practice provides that, if a litigant fails to comply with Rule 24.10, an appellate court will not reverse a trial court's denial of a continuance. Lee does not dispute that he failed to comply with the rule. His only contentions are that the rule is not "adequate" for procedural default purposes and, in the alternative, that his failure to comply with the rule should be excused. Neither contention has merit.[1]

I. 1. Application of the adequate and independent state ground doctrine to procedural defaults in habeas cases "recognize[s] the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). State procedural rules that serve legitimate state interests and are "firmly established and consistently applied" are "adequate" for purposes of the doctrine. This Court's few decisions

[1] Because Lee's failure to comply with Rule 24.10 suffices to bar his constitutional claims, amici do not address Lee's failure to comply with Rule 24.09.

finding state procedural rules inadequate to support procedural defaults involved extreme and unjustifiable actions by state courts that contrast sharply with what transpired here.

2. Rule 24.10 serves several legitimate state interests, most notably ensuring that the trial court obtains at the appropriate time the information it needs to rule on a continuance application. Like numerous other commonplace procedural rules, Rule 24.10 channels the presentation of an issue so that it can be resolved without disrupting (or undoing) the proceeding. That policy interest applied with full force to this case.

Had Lee complied with the rule, he would have informed the court, *inter alia*, of the purported central importance of the missing witnesses' testimony. Lee failed to do so; not until his motion for post-conviction relief did he set forth the reasons why the requested continuance was important to his case. Lee's failure to comply with Rule 24.10 placed the Missouri courts in precisely the position the rule was designed to prevent—forcing post-conviction and appellate courts to consider arguments not presented at trial and which would now greatly disrupt the judicial process if accepted.

Lee's reliance upon his counsel's opening statement is unpersuasive. He cites no Missouri rule that would permit assertions in an opening statement to substitute for the showing required (under oath) by Rule 24.10. Moreover, an opening statement is merely a map for a jury of what the potential evidence may be. That map often changes, as unexpected testimony is elicited or strategies revisited. It is not a judge's responsibility to look to that earlier map to resolve a

continuance application; it is counsel's responsibility to make his arguments and (sworn) assertions in the application.

3. Rule 24.10 is firmly established and has been regularly applied. In cases such as *State v. Boykins*, 399 S.W.2d 70 (Mo. 1966), and *State v. Cuckovich*, 485 S.W.2d 16 (Mo. 1972), the Missouri Supreme Court has held that failure to comply with the continuance rules are sufficient grounds to deny an application for a continuance. The Missouri Court of Appeals has adhered to that ruling on numerous occasions, even in cases (such as Lee's) where counsel had little notice of witnesses' absence.

It matters not that the Missouri Court of Appeals has several times affirmed trial court denials of continuances on the merits, even though the defendants had violated Rule 24.10. Such holdings were perfectly consistent with the rule, for no continuances were ordered. In any event, a procedural rule does not become "inadequate" merely because it is applied with some minor inconsistencies.

II. Lee cannot show cause to excuse his default. The only "cause" proffered by Lee is the sudden disappearance of his witnesses. That disappearance does not explain, let alone justify, his failure to apprise the trial court of the information mandated by Rule 24.10, such as the materiality of witnesses' expected testimony.

Nor is Lee justified in invoking the "fundamental miscarriage of justice" exception to the procedural bar rule. That exception is limited to cases where probable innocence can be shown. Even if the missing witnesses had testified in the manner Lee now suggests, their

testimony would have conflicted with that of four witnesses at trial. Thus, the jury would have been faced with a credibility issue. This is hardly the "rare" or "extraordinary situation," *Schlup v. Delo*, 513 U.S. 298, 321 (1995), that justifies application of the exception.

ARGUMENT

I. Lee's Violation of Missouri Supreme Court Rule 24.10 is an Adequate and Independent State Ground to Support the Missouri Court of Appeals' Judgment

A. Application of the Adequate and Independent State Ground Doctrine to Federal Habeas Furthers Significant Practical and Federalism Interests

1. The "adequate and independent state ground" doctrine dates back to "the time of [the Court's] foundation," *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945), and was reaffirmed in *Murdock v. City of Memphis*, 87 U.S. 590, 632-633 (1874), where the Court stated that it should not "examine and decide other questions not of a Federal character." If the state law bases for a lower court decision "are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question," the Court would not be justified in reviewing the matter. *Id.* at 635. By the turn of the century, the "adequate and independent state ground" concept was fully ingrained in the Court's jurisprudence. *See Fox Films Corp. v. Muller*, 296 U.S. 207, 210 (1935).

This Court has long applied the doctrine to "state decisions forfeiting federal claims for violation of state procedural rules." *Harris v. Reed*, 489 U.S. 255, 261

(1989) (quoting Daniel Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1134 (1986)). After some fits and starts, the Court made clear in *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), that this application of the doctrine applies in federal habeas. *Sykes* and later cases, culminating in *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), confirmed that "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."

The notion that constitutional rights can be forfeited in criminal cases "by the failure to make timely assertion of the right" is neither novel nor unfair. *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). Criminal trials can proceed in an orderly manner only if rules of procedure are imposed and firmly enforced. *Taylor v. Illinois*, 484 U.S. 400, 411 (1988). For this reason, the federal criminal justice system and all state criminal justice systems penalize those who sleep on their rights. Modern habeas corpus law merely applies that bedrock principle by respecting the penalties imposed by state courts. And it does so in a forgiving way, by excusing petitioners' defaults if they can show cause and prejudice or actual innocence.

Any other rule would contravene "considerations of comity and federalism." *Coleman*, 501 U.S. at 746 (quoting *Francis v. Henderson*, 425 U.S. 536, 541-42

(1976)). Giving "greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants . . . would reflect an anomalous and erroneous view of federal-state relations." *Id.* By contrast, application of the adequate and independent state ground doctrine to procedural defaults in habeas cases "recognize[s] the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Id.* at 750.

2. Notwithstanding the important state interests served by the federal courts' deference to the states' procedural rules, not every such rule is an "adequate" one that can support a procedural default. Although this Court has not enunciated a definitive definition of the term "adequate" in this context, it has described the types of rules that are not adequate. A state procedural rule which, on its face or as applied, is "an arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958), and does not serve "a legitimate state interest," *Henry v. Mississippi*, 379 U.S. 443, 448-449 (1965), is not adequate. The Court held that the Kentucky Supreme Court ran afoul of this principle when the latter ruled that a defendant lost the right to obtain a particular jury instruction because his counsel requested an "admonition" from the judge, rather than an "instruction." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

In *James*, the Court also held that a state procedural rule that is not "firmly established and regularly followed" is not adequate. *Id.* Applying that standard in *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991), the Court held that the Georgia Supreme Court's retroactive application of a rule requiring

Batson claims to be made prior to the time jurors are sworn was not an adequate procedural bar. At the time of petitioner Ford's trial, it was permissible for a defendant to raise a *Batson* claim after the jury had been sworn. The rule applied by the Georgia Supreme Court—which was created two years after Ford's trial— was obviously not "firmly established" at the time of that trial. *Id.*

Lee does not dispute that Missouri Supreme Court Rule 24.10 is independent of federal law. Thus, the issue before the Court is whether or not that rule provides an adequate state ground to support the judgment. For the reasons set forth below, this Court should conclude that it does. The Missouri Court of Appeals' application of Rule 24.10 is utterly unlike the application of procedural rules in *James* and *Ford*. To the contrary, the Missouri court acted sensibly and in accordance with longstanding state practice.

B. Rule 24.10 Serves Significant Public Purposes Generally and as Applied in this Case

Missouri Supreme Court Rule 24.10 provides that an application for a continuance on account of the absence of witnesses must set forth: (1) the facts showing the materiality of the evidence sought to be obtained; (2) due diligence on the part of the applicant to obtain the witnesses and the testimony; (3) the name and residence of the absent witnesses, if known; (4) facts showing reasonable grounds for belief that the attendance or testimony of the witnesses will be procured within a reasonable time; (5) the particular facts "the affiant" expects the witnesses will prove, and that such facts cannot be proven through other witnesses or evidence; (6) that the applicant is not

responsible for the witnesses' absence; (7) and that the application is made in good faith.

The core of Lee's argument is that, in his "unusual situation," it was senseless to apply Rule 24.10 strictly. *See* Pet. Br. 19, 34-41. The opposite is true. The laudable public policy objectives of the rule were fully applicable to Lee's situation. By failing to comply with the rule, Lee withheld from the trial court the arguments he later made to other tribunals in support of his continuance application. It is commonplace for claims to be forfeited because they (or facts supporting them) are made at the wrong time. Nothing more occurred here.

1. Rule 24.10, far from being an "arid ritual," serves numerous state interests. The rule ensures that the trial court obtains at the appropriate time the information it needs to rule on the continuance request; provides guidance to litigants; standardizes practice across the state; mandates preparation by the parties; provides reliability through the affidavit requirement; and allocates the burden of proof.

The first listed purpose is perhaps the most significant. Rule 24.10 gives a trial court the ability to issue a timely and correct ruling on the motion by requiring the moving party to set out the critical facts and asserted need for a continuance. As noted by Professor Meltzer, rules such as Rule 24.10 serve the

> promotion of focused consideration of particular questions at different times, when the pertinent evidence and argumentation can be mustered; and the avoidance of wasteful proceedings by requiring prompt consideration of issues upon whose resolution further

> matters (or the continuation of the proceeding at all) depend. It is hard to imagine an effective procedural system lacking such rules of the road.

Daniel J. Meltzer, *supra*, 99 Harv. L. Rev. at 1134-35. Rule 24.10 sets forth a blueprint for trial courts that clarifies the showing that must be made at the critical moment in the proceedings.

Rule 24.10 also serves the interests of the parties, by guiding counsel as to the required contents of a continuance application and sparing the court the need "to instruct the applicant on how he may obtain a continuance." *State v. McGinnis*, 622 S.W.2d 416, 420 (Mo. Ct. App. 1981). The proponent does not have to hazard a guess whether his request will at least merit consideration on its merits by the court. Moreover, the proponent will know where to file the application, when he has to file, and what he has to file. And since the procedural rule is applicable statewide, a party can walk into a courtroom in any city or town in Missouri and know what is expected.

Rule 24.10 also forces parties to prepare and be prepared. It establishes that a party is not entitled to an automatic continuance because of a missing witness or misplaced evidence. The rule thereby prevents abuse by parties who did not prepare their case or are not practicing due diligence in preparing the case. *State v. Boykins*, 399 S.W.2d 70, 73-74 (Mo. 1966). Finally, through its affidavit requirement and placement of burden of proof on the movant, Rule 24.10 imposes duties on the movant that increase reliability and reduce unnecessary delays of trials.

2. This type of procedural rule is commonplace and vital to all states. As the Court has said, "[e]ach State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984). "Procedural rules establishing the time and manner for asserting rights in state courts are familiar" and "serve critical purposes." Meltzer, *supra*, 99 Harv. L. Rev. at 1134.

Even if we focus strictly on rules governing continuances, we see that Missouri's approach is run-of-the-mill. A majority of the states in the Eighth Circuit alone have rules on continuances that are similar to Missouri's. Moreover, several supreme courts of those states have held, as Missouri's has, that if a proponent of a motion to continue fails to comply with the procedural rules the trial court may overrule the application for the continuance. *See* Ark. Code Ann. §16-63-402 (Michie 1987); Ark. R. Crim. P. 27.3; *Wilson v. State*, 895 S.W.2d 524, 526 (Ark. 1995); Iowa R. Civ. P. 183(b); *State v. Ware*, 338 N.W.2d 707, 714 (Iowa 1983) (Rule 183 applies to criminal cases); Minn. Stat. Ann. § 631.02 (West Supp. 2001); Neb. Rev. Stat. Ann. §§ 25-1148, 29-1206 (Michie 1995); N.D. Cent. Code §§ 29-19-06, 29-19-08 (1991); *State v. Letcher*, 552 N.W.2d 402, 407 (S.D. 1996).

3. Lee does not dispute that he failed to meet many of the requirements of Rule 24.10. Instead, the thrust of Lee's argument is that (1) Rule 24.10 was not adequate "as applied to Lee's unusual situation, where an oral motion for continuance was necessitated by the sudden and unexpected disappearance of Lee's witnesses" (Pet. Br. 19), and (2) the materiality of the

alibi testimony was "obvious and unquestioned" (Pet. Br. 37). Neither contention has merit. The Missouri Court of Appeals was entirely justified in dismissing Lee's appeal based on his failure to comply with the requirements of Rule 24.10.

The public policies served by Rule 24.10—in particular, ensuring that the court is provided with the information it needs to make a reasoned decision—applied with full force here. Had Lee complied with Rule 24.10 (to the extent it can be complied with orally), he would have informed the court (through his counsel's argument and/or his own testimony) that his motion should be granted because of the central importance of the witnesses' testimony to the case. He would have stated that the witnesses were expected to place Lee in California when the murder was committed, which would contradict the testimony of several of the states' key witnesses. Had the trial court heard that argument, with facts supporting it, it may have granted the motion. But when Lee failed to proffer any reason to delay the trial on account of the missing witnesses—stating only that "it's valuable to my case" (J.A. 18)—the court took the only sensible course based on the information then available to it: denying the motion.

The opening statement of Lee's counsel cannot substitute for argument in a motion for a continuance (or oral argument supporting an oral motion). Lee cites no Missouri law that would allow the piggybacking of statements made in one part of a trial onto a separate, distinct hearing. Moreover, one purpose of Rule 24.10 is to force a proponent to declare, under penalty of perjury, that he believes the motion to be true. By contrast, an opening statement is not subject to a

challenge or punishment. Opening statements merely provide a map or guide for the trier of fact of the evidence counsel expects to present. During a trial, however, the theory of the case may change and the "map" may need to be updated or thrown out completely.

Lee's own actions during the trial and in post-trial papers suggest that is precisely what happened. Were the missing witnesses truly central to Lee's case, one would have expected Lee to have said so when seeking the continuance. At the very least, one would have expected Lee to have said so in later proceedings before the trial court. Yet only when Lee filed his application for post-conviction relief did he attempt to explain to a court the purported importance of obtaining the continuance. J.A. 56-59.

Given Lee's own delay in raising the alleged centrality of the missing witnesses, it is hard to find fault with the trial court for failing to detect that alleged centrality on its own. But even if we assumed for the sake of argument that the trial court easily could have seen the alleged importance of the missing witnesses, that does not excuse Lee's failure to comply with Rule 24.10. In many cases, literally thousands of bits of information pass before the eyes and ears of a judge on a daily basis. Without the focus brought upon by strict adherence to the rules, a trial court is forced to wander throughout the deep depths of an entire trial to pinpoint one moment in time where the proponent of the motion may have referred to the reason he wanted a particular witness to testify.

With these rules, the focus of the requesting party is clear and a trial judge can make an informed and educated judgment on whether the proponent met his

burden without having to guess the exact reason for the request. After all, the burden to demonstrate the need for a continuance is not on a judge; it is on the proponent of the continuance. Rule 24.10 is in place to aid the judge in determining if the missing evidence or testimony is material. Lee paid the long-standing, commonplace price for non-compliance with the rule.

C. Rule 24.10 is Firmly Established and Has Been Regularly Followed

1. Rule 24.10 was adopted by order of the Missouri Supreme Court in 1979 and has existed in some form for more than a century. The present rule derives from Mo. Rev. Stat. §545.720 (2000), which can be traced back to the Missouri Revised Statutes of 1889 and possibly earlier. *See* Mo. Rev. Stat. §4181 (1889) (precursor to §545.720).

The Missouri courts have regularly applied Rule 24.10 to affirm the denial of a continuance. For example, in *State v. Boykins*, *supra*, the Missouri Supreme Court found that the defendant had not met the requirements of former Missouri Supreme Court Rule 25.08 (a precursor to Rule 24.10). The court held that "[u]nder the applicable rule the trial court had no alternative but to overrule the application." 399 S.W.2d at 74. And in *State v. Cuckovich*, 485 S.W.2d 16 (Mo. 1972), the Missouri Supreme Court recognized that failure to comply with former Rule 25.08 was, by itself, sufficient grounds for denying the motion for a continuance. In *Cuckovich*, a witness was allegedly unavailable due to an illness. Finding that the continuance application did not comport with the rule, the court affirmed the trial court's exercise of its discretion to overrule the motion. *Id.* at 21-22.

Following the Missouri Supreme Court's lead, the Missouri Court of Appeals has held, time after time, that when a continuance request based on absent witnesses failed to conform to Rule 24.10, the trial court did not abuse its discretion by denying the motion. *See, e.g., State v. Collie*, 503 S.W.2d 445, 446-47 (Mo. Ct. App. 1973); *State v. Martin*, 515 S.W.2d 802, 804 (Mo. Ct. App. 1974); *State v. Paige*, 550 S.W.2d 582, 583-84 (Mo. Ct. App. 1977); *State v. Henderson*, 568 S.W.2d 556, 558 (Mo. Ct. App. 1978); *McGinnis*, 622 S.W.2d at 420; *State v. Green*, 647 S.W.2d 902, 903-04 (Mo. Ct. App. 1983); *State v. Freeman*, 702 S.W.2d 869, 874 (Mo. Ct. App. 1986); *State v. Morin*, 873 S.W.2d 858, 871 (Mo. Ct. App. 1994). This longstanding practice has obtained even in cases where, as here, witnesses unexpectedly were not available for trial. *See* Resp. Br. at 26-27 (citing cases).

Missouri law is clear that, once an appellate court concludes that a procedural violation has occurred, it need not look any further and can uphold the trial court's denial of a continuance application even if the trial court did not rely on that violation. *See State v. Jack*, 813 S.W.2d 57, 60 (Mo. Ct. App. 1991). All litigants in Missouri know or should know about the need to comply with Rule 24.10. In contrast to *Ford v. Georgia*, all parties are "deemed to have been apprised of" Rule 24.10, which was published and interpreted by the Missouri appellate courts long before Lee's trial.

2. Lee nevertheless argues that Rule 24.10 is not "adequate" because (1) Missouri courts have often denied continuance requests on their merits notwithstanding violations of the rule, and (2) the rule "describes the actual substantive showing required to obtain a continuance." Pet. Br. 32-33. As to the former

argument, Lee's premise does not support his conclusion. Missouri appellate practice provides that if a litigant fails to comply with Rule 24.10, an appellate court will not *reverse* a trial court's denial of a continuance. Appellate decisions *affirming* trial court denials of continuances is not inconsistent with that rule. Lee points to no Missouri appellate cases in which trial court denials of continuances were reversed even though the litigant had failed to comply with Rule 24.10.

Moreover, the very basis of the *Harris v. Reed*, *supra*, "plain statement" rule is that state courts can foreclose federal habeas review by (plainly) relying on a state procedural bar while reaching the merits of a federal claim as an alternative holding. Stated the Court: "By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." 489 U.S. at 264 n.10.

Concomitantly, a state procedural rule does not become "inadequate" merely because the state courts on occasion move past the procedural default and reject a claim on its merits. *See Dugger v. Adams*, 489 U.S. 401, 410-11 n.6 (1989) (finding Florida procedural rule adequate even though the Florida Supreme Court "has addressed the merits in several cases" where the rule had been violated). Thus, Rule 24.10 is not rendered inadequate merely because the Missouri state courts have sometimes affirmed on the merits trial court denials of continuance applications that had failed to conform with Rule 24.10.

Lee's second argument—that Rule 24.10 "describes the actual substantive showing required to obtain a

continuance"—is equally unavailing. The rule on its face sets forth what a continuance application "shall show." The rule does not provide, or even infer, that once a movant makes that showing the trial court must grant a continuance. It could not be otherwise. A trial court can readily conclude that a continuance should not be granted even where a litigant has set forth the purportedly material facts to which a missing witness would attest (as well as the other information required by Rule 24.10). As this Court has recognized, "[t]rial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *Morris v. Slappy*, 461 U.S. 1, 11 (1983).

II. Lee Cannot Demonstrate Cause and Prejudice or a "Fundamental Miscarriage of Justice" to Excuse His Procedural Default

1. A procedural default can be excused if a person can demonstrate good cause for not following the state procedural rule and was prejudiced from the rule's application. *See Sykes*, 433 U.S. at 87. Even were we to assume that Lee could show prejudice, he cannot show cause.

The "cause" upon which Lee relies is the "sudden disappearance of [his] alibi witnesses." Pet. Br. 42. But that utterly fails to explain why Lee, in his application for a continuance, failed to state why the witnesses were necessary, the facts to which they would testify, or the materiality of that expected testimony. The disappearance of the witnesses set the stage for the continuance request; it did not "cause" his failure to comply with state-law requirements of such a request.

Likewise, whether or not a court officer "induced the witnesses to leave" (Pet. Br. 42) is besides the point. It does not bear on why Lee failed to put forth facts and arguments in his request to the trial court for a continuance. In the end, Lee does not truly assert "cause"; he simply reiterates his arguments as to why his non-compliance with Rule 24.10 should not justify a procedural default in the first instance.

The only conceivable "cause" for Lee's default was the arguably poor performance of his counsel. *Cf. Murray v. Carrier*, 477 U.S. 478, 492 (1986) (setting forth standards for when counsel's performance can serve as "cause"). The Eighth Circuit, however, found that Lee had not properly presented his ineffective-assistance claim to the state courts (J.A. 235; Pet. App. A-3), and Lee has not advanced that argument to this Court.

2. A procedural default can also be excused in order to prevent a "fundamental miscarriage of justice." *See Coleman*, 501 U.S. at 750. The Court has limited this escape valve to cases where it is more likely than not that no reasonable juror would have convicted the habeas petitioner in light of the new evidence of innocence. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). The fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of judicial resources with the individual interest in justice that arises in the extraordinary case. *Id.* at 324. To ensure that the fundamental miscarriage of justice exception would remain "rare" and would only be applied in the "extraordinary case," while at the same time ensuring that it would extend relief to those who were truly deserving, the Court explicitly tied it to the petitioner's innocence. *Id.* at 321.

Lee's case does not present the "rare" or "extraordinary" situation contemplated by *Schlup*. Two eyewitnesses placed Lee in the getaway car (J.A. 124-25); two additional witnesses testified that they saw Lee with the other culprit in Missouri the night before the murder (T.Tr. 450-53, 471-74)—all of which directly contradicts the testimony Lee's missing witnesses purportedly would have made. Hence, the "evidence" Lee wanted to introduce would have presented the jury with a routine credibility question. This is not a case where DNA evidence has demonstrated a defendant's innocence or even where a key witness has recanted his testimony. The fundamental miscarriage of justice exception would be a gaping loophole to the procedural default rule if it applied in such an ordinary case.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

REMON LEE,

Petitioner,

vs.

MICHAEL KEMNA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When state law provides both fair notice of the existence of a procedural rule and a reasonable opportunity to comply, is the state's default rule rendered "inadequate," for the purpose of subsequent federal habeas review, by occasional state-court cases which deny defaulted, meritless claims on the merits rather than invoking the default rule?

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Reece v. Georgia, 350 U. S. 85, 100 L. Ed. 77,
76 S. Ct. 167 (1955) 16

Reich v. Collins, 513 U. S. 106, 130 L. Ed. 2d 454,
115 S. Ct. 547 (1994) 12

Rogers v. Alabama, 192 U. S. 226, 48 L. Ed. 417,
24 S. Ct. 257 (1904) 17

Shuttlesworth v. Birmingham, 376 U. S. 339,
11 L. Ed. 2d 766, 84 S. Ct. 795 (1964) 8

Sochor v. Florida, 504 U. S. 527, 119 L. Ed. 2d 326,
112 S. Ct. 2114 (1992) 21

Staub v. City of Baxley, 355 U. S. 313, 2 L. Ed. 2d 302,
78 S. Ct. 277 (1958) 6, 17

Steel Co. v. Citizens for a Better Environment, 523 U. S. 83,
140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) 20

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067,
96 S. Ct. 3037 (1976) 11

Strickland v. Washington, 466 U. S. 668,
80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) 20, 21

Sullivan v. Little Hunting Park, Inc., 396 U. S. 229,
24 L. Ed. 2d 386, 90 S. Ct. 400 (1969) 6, 9, 12, 17

Sunal v. Large, 332 U. S. 174, 91 L. Ed. 1982,
67 S. Ct. 1588 (1947) 5

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 21

Walker v. Birmingham, 388 U. S. 307,
18 L. Ed. 2d 1210, 87 S. Ct. 1824 (1967) 9, 12

Ward v. Board of Commr's of Love Cty., 253 U. S. 17,
64 L. Ed. 751, 40 S. Ct. 419 (1920) 6, 18

Williams v. Georgia, 349 U. S. 375, 99 L. Ed. 1161,
75 S. Ct. 814 (1955) 8, 9, 20

Williams v. Taylor, 529 U. S. 362, 146 L. Ed. 2d 389,
120 S. Ct. 1495 (2000) 20

Wright v. Georgia, 373 U. S. 284, 10 L. Ed. 2d 349,
83 S. Ct. 1240 (1963) 8

United States Statutes

28 U. S. C. § 1257 5

28 U. S. C. § 2254 5

28 U. S. C. § 2254(b) 10, 14, 15, 21

28 U. S. C. § 2254(c) 10

28 U. S. C. § 2254(d) 20

28 U. S. C.§ 2254(e)(2) 3

Treatises

16B C. Wright, A. Miller, & E. Cooper, Federal Practice
and Procedure (2d ed. 1996) 4, 7, 8, 10-13, 18

R. Fallon, D. Meltzer, & D. Shapiro,
Hart & Wechsler's The Federal Courts and the
Federal System (4th ed. 1996) 6, 7, 8

R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice (7th ed. 1993) 19

Miscellaneous

V. Flango, Habeas Corpus in State and Federal Courts (National Center for State Courts 1994) 20

Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869 (1994) 8, 11, 13, 18

Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943 (1965) 6, 7, 8, 16, 18

Judicial Council of Cal., Court Statistics Report (1999) .. 21

Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187 ..... 7, 11

IN THE

Supreme Court of the United States

REMON LEE,

Petitioner,

vs.

MICHAEL KEMNA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, petitioner has asked this Court to declare a Missouri state procedural rule "inadequate" to support the state court's judgment. The test of adequacy that petitioner asks this Court to use would cause widespread disregard of state

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

rules of procedure in federal habeas cases. The resulting destructive impact on the finality of criminal judgments and the integrity of the state's judicial process would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Steve Shelby was murdered on August 27, 1992, in Kansas City, Missouri. Witnesses identified Reginald Rhodes as the triggerman and petitioner Remon Lee as the getaway driver. J. A. 124-125 (state appellate court opinion, unpublished). Rhodes pled guilty. J. A. 38. Three members of Lee's family were going to testify that he was in California with them on the day of the murder, but when the time came for them to testify, they could not be located. J. A. 125. Defense counsel made an oral motion for a continuance, which was denied. J. A. 20-22.[2]

Defendant was convicted of first-degree murder. J. A. 124. He moved for a new trial, claiming denial of the continuance was error but giving no explanation for the witnesses' disappearance and claiming no federal constitutional violation. J. A. 31-32. The trial court entered judgment. J. A. 42-43.

While the direct appeal was pending, Lee moved for post-conviction relief in the trial court. That court appointed counsel, who filed an amended motion. J. A. 68. The court denied relief. J. A. 67. On the issue of denial of the continuance, the court held this was a question for the direct appeal, not post-conviction. J. A. 70.

The Missouri Court of Appeals affirmed both the conviction and the denial of post-conviction relief. J. A. 122.

On the continuance issue, the court first noted that the motion was not in writing accompanied by an affidavit, and

2. Further details on the circumstances of the motion are provided in the Brief for the States of Nebraska et al. as *Amici Curiae*.

there was "no indication of the State's consent to this deviation, as is required by [Missouri Supreme Court] Rule 24.09." J. A. 126-127. However, the court went on to "assum[e] *arguendo* that the oral motion was sufficient" but held "appellant's argument still fails." J. A. 127. The motion failed to set out the required elements under Missouri Supreme Court Rule 24.10, and this was sufficient to sustain the denial on appeal. J. A.127 (citing *State* v. *Morris*, 873 S. W. 2d 858, 871 (Mo. App. 1994)).

Petitioner filed his federal habeas petition on January 16, 1998. J. A. 132. The continuance issue was Ground 6. J. A. 213. Petitioner submitted affidavits from his three alibi witnesses stating that they had left the courthouse the day of the trial because a court officer had told them they would not be needed until the next day, J. A. 172, 174, or, in one affidavit, simply that "those people in Missouri" had said so. J. A. 169. The District Court found that 28 U. S. C. § 2254(e)(2) applied to these allegations. J. A. 215. That subsection forbids an evidentiary hearing when petitioner failed to develop the factual basis of his claim in state court, with certain exceptions. The court noted that the factual basis, statements of his own family, was available to petitioner at all times, and that none of the exceptions applied. J. A. 215.

The District Court held that the claim was procedurally defaulted. J. A. 217. The District Court also denied petitioner's Rule 60(b) motion and a certificate of appealability. J. A. 231. The Court of Appeals granted a certificate of appealability limited to "the question of whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance." J. A. 232.

The Court of Appeals held that the claim was procedurally defaulted. *Lee* v. *Kemna*, 213 F. 3d 1037, 1038 (CA8 2000) (*per curiam*), J. A. 234. Immediately preceding this holding is a quote from *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991), noting the requirements that the state procedural ground be adequate and independent, so this holding constitutes a rejec-

tion of the dissent's claim that the state ground was inadequate. The dissenting judge concluded, on the other hand, "The circumstances in which Lee moved for a continuance make it particularly unlikely that he could be *deemed to have been apprised* of the applicability [of] Rules 24.09 and 24.10." *Id.*, at 1045, J. A. 247 (emphasis added). The full Eighth Circuit denied rehearing en banc, two judges dissenting. J. A. 258.

SUMMARY OF ARGUMENT

This Court has used a variety of phrases over many years to describe when a state ground is "adequate" or "inadequate" to preclude federal court review of an issue. These phrases form a haphazard patchwork that has drawn considerable scholarly criticism. A coherent formulation, which takes into account the underlying policies and is consistent with the results of nearly all the precedents, is both desirable and possible.

The correct rule, *amicus* submits, is one along the lines proposed by the late Professor Charles Alan Wright, et al. That is, the claimant should have notice that the rule exists and applies to his situation and should have a reasonable opportunity to present his federal claim. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 286-287, 392 (2d ed. 1996).

This formulation would give the states the proper latitude to form and enforce their own consistent set of procedural rules for the presentation of all claims, state and federal. At the same time, it would enable the federal courts to step in when state rules are manipulated to evade federal law, to discriminate against federal rights, or to facilitate invidious discrimination against disfavored groups.

Implications from previous cases that state rules must be "strict" or that they cannot be "discretionary" should be expressly repudiated. These statements create perverse incentives for states to create harsh regimes of rigid procedural

defaults and to discourage needed exceptions when justice requires them.

This formulation is consistent with the results of all the major precedents except *Henry* v. *Mississippi*. That case was wrongly decided at the time, and it was also based on since-overruled precedent. *Henry* has little value as precedent and should not prevent the formulation of a coherent standard.

Under any standard, state decisions which skip past a procedural default issue to deny, rather than grant, relief on the merits should not be deemed to be a failure to enforce the rule. Such action does open the individual case to federal review on the merits, but it does not detract from the procedural rule. As both this Court and Congress have noted, it is occasionally more efficient to skip a knotty procedural question and deny a patently meritless claim on the merits. States should not be penalized for doing the same.

ARGUMENT

I. "Reasonable opportunity" should be adopted as the test of adequate state procedural grounds, and the prior patchwork of confusing phrases discarded.

A. "An Untidy Area."

Justice Frankfurter once referred to habeas corpus as "an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal* v. *Large*, 332 U. S. 174, 184 (1947) (dissenting opinion). Habeas in general has been cleaned up considerably since then, but "adequate and independent state grounds" remains an unkempt corner in need of "systematic consideration."

The problem of adequate and independent state grounds is common to state-prisoner habeas cases under 28 U. S. C. § 2254 and this Court's direct review of state judgments under 28 U. S. C. § 1257. See *Harris* v. *Reed*, 489 U. S. 255, 260-262

(1989). Most of this Court's precedents on the subject are in the latter category. These precedents span the entire twentieth century, and they form a haphazard patchwork, offering "Varying Rubrics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 582 (4th ed. 1996) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Tel. Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923) involved a jurisdictional objection based on an executive order implement-

ing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading making the appearance clearly stated the objection. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.*, at 24.

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 6. The two cases were decided only two years apart. Both were unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*.

Henry v. *Mississippi*, 379 U. S. 443, 447 (1965) seemed to say that the test was whether the state rule served a "legitimate state interest."[3] In *Monger* v. *Florida*, 405 U. S. 958 (1972)

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3. We hedge with "seemed," because the *Henry* opinion is universally considered unclear. See Hart & Wechsler, *supra*, at 584 ("confusing"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4020, p. 288 (2d ed. 1996) ("surprisingly ambiguous"); Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 196, n. 39 ("puzzling"); Hill, *supra*, 65 Colum. L. Rev., at 984, n. 173 ("confusing"); *id.*, at 986, n. 174 ("unclear").

(*per curiam*), the defendant's claim had been barred by one of the rare procedural rules that appears to lack a legitimate interest. He had filed his notice of appeal too early, before formal entry of judgment, and not renewed it afterward. *Id.*, at 958-959 (Douglas, J., dissenting). The dissent quoted *Henry* to no avail. *Id.*, at 961-962. The Court's summary order merely states the claim is barred. See *id.*, at 958; see also Hart & Wechsler, *supra*, at 585-586 (citing *Monger* and other cases for "*The Demise of Henry*"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4028, pp. 396-397 (2d ed. 1996).

At times, the standard seems to appear out of nowhere. In *Henry*, *supra*, the Court declared that its "legitimate state interest" standard was based on settled law, 379 U. S., at 447, but this assertion is simply false. See Hill, 65 Colum. L. Rev., at 988; Wright, Miller, & Cooper, *supra*, § 4020, at 289 (cases cited do not support this statement); Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 899 (1994) ("remarkable remake of the . . . doctrine"). Similarly, *Barr* v. *City of Columbia*, 378 U. S., at 149, claimed that its "strictly or regularly followed" standard reflected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 301 (1964), quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955) but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the particular circumstances is, in effect, an avoidance of the federal right." *Id.*, at 383. The "strictly" requirement in

Barr was a bolt from the blue, and, as discussed *infra*, at 13, one that can cause perverse results if taken literally.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words, instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the procedure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id.*, at 234; see also *infra*, at 12-13 (quoting Wright, et al., critique of *Sullivan*). Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id.*, at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims, and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a standard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he

should have a reasonable opportunity to present his federal claim. See Wright, Miller, & Cooper, *supra*, § 4027, at 386-387, 392. Nothing more is required.[4]

B. Policy Reasons.

These are solid policy reasons for federal courts to respect the procedural rules of state courts. See *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991). In our federal system, state courts must necessarily adjudicate federal questions, because it would be impractical to remove every case with a federal issue to federal court. Practical considerations also preclude having two different sets of procedural rules: one for state issues and another for federal. See Wright, Miller, & Cooper, *supra*, § 4021, at 302. A single objection will often have both state and federal grounds, such as the hearsay rule and the Confrontation Clause. Having two different sets of rules for the time to raise a single objection would be chaotic.

On habeas corpus, there is an additional reason for recognizing and giving effect to state procedural default rules. The requirement that the petitioner first exhaust state remedies is a time-honored federal policy. See 28 U. S. C. § 2254(b), (c); *Ex parte Royall*, 117 U. S. 241, 253 (1886). Respect for state procedural default rules is necessary to " 'protect the integrity' of the federal exhaustion rule." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999) (quoting *id.*, at 853 (Stevens, J., dissenting)). Without the default rule, "a prisoner could evade the exhaustion requirement—and thereby undercut the values that it serves—by 'letting the time run' on state remedies." *Id.*, at 848.

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4. If trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000).

Balanced against these considerations are "the federal interests in protecting federal rights against bad procedure." Wright, Miller, & Cooper, *supra*, § 4021, at 302. Underlying many of the old cases is a strong, if unstated, suspicion of state-court hostility to the underlying federal law. It is not coincidental that the most sweeping statements come in cases of black defendants and the NAACP from the South at the height of the civil rights struggle. See Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 190; see also Glennon, 61 Tenn. L. Rev., at 885-902 (describing how state grounds doctrine shifted during the civil rights struggle and has since shifted back). Fortunately, this era is behind us, and has been for some time. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976). This is not to say the Court was wrong to do what it did in the 1960s. Great struggles may require drastic measures, but when the crisis is over we should return to the normal modes of procedure. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866).

Conscious hostility is not the only danger to federal rights, however. Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case. See *Michel* v. *Louisiana*, 350 U. S. 91, 95 (1955). For example, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262-263 (1982) involved a rule against raising new issues in a petition for rehearing. This is generally a fair and unobjectionable rule. In the particular case, though, the state court had salvaged a facially unconstitutional statute through drastic and unexpected surgery, see *id.*, at 258-259, thereby raising a different federal question from the one originally presented. As a practical matter, the petition for rehearing was the first opportunity to raise this claim. Federal rights need protection from an unreasonable refusal to make a needed exception to a normally fair rule.

Another situation which still arises on occasion is the inherently fair rule which is unfairly applied retroactively. A

state may legitimately specify *in advance* which of two possible remedies a claimant must pursue, but it cannot "bait and switch." See *Reich* v. *Collins*, 513 U. S. 106, 111 (1994). Similarly, there is a federal interest in protecting federal rights from unforeseeable applications of existing rules. See *supra*, at 9 (discussing *Sullivan*). A competent lawyer should be able to discern the contours of the rule with sufficient clarity that he or she knows what to do to safely preserve the claim. See *Walker* v. *Birmingham*, 388 U. S., at 320 (petitioners "on notice" of the correct procedure and not "entrapped or misled"). That does not mean that the boundaries of the rule must be so crisp that the lawyer can confidently skate on the edge. There are good reasons for rules to be flexible, see Wright, Miller, & Cooper, *supra*, § 4026, at 386, and flexibility necessarily creates fuzzy boundaries. It means that a procedure that appears to be in clear compliance cannot suddenly be declared to be a default.

However, there is *no* federal interest in compelling or even encouraging the states to purge all discretion from the operation of their procedural default rules. This is the perverse incentive of opinions such as the majority in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*.

> "The possible implication in the Sullivan opinion that discretionary state grounds cannot provide adequate reason to refuse to consider a federal question is unwarranted. There are many valid reasons for framing procedural rules in general, 'discretionary' terms. Precisely defined rules cannot take account of the gravity of a procedural failure, the strength of the excuses offered, or the importance of the procedural and substantive consequences of excusing or punishing the failure. In many circumstances, appellate courts invest lower courts with discretion both because of a belief that a better decision will result, and because of a conviction that in any event the matter does not justify the institutional cost of plenary review. Although there is a modest risk that discretionary procedural sanctions may be invoked more harshly against disfavored federal rights, that

> does not warrant blanket disregard of state procedure. Instead, the discretionary nature of the state rule may be considered in applying the better tests of adequacy set out in the next section. If discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law, or to deny a fair opportunity to present federal claims, the state ground may be found inadequate." Wright, Miller, & Cooper, *supra*, § 4026, at 385-386.

Along the same line, there is no federal interest in denying effect to any state procedural rule which is not "strictly" applied in the sense of iron-clad severity. Again, such a formulation provides a perverse incentive for states to make their default rules more severe and less flexible than the state might otherwise choose. "The Court should continue to recognize that sound procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts." *Id.*, § 4028, at 403.

Dugger v. *Adams*, 489 U. S. 401 (1989) illustrates that this Court does not apply the "strictly" requirement literally. The dissent argued that the Florida Supreme Court had reached the merits in two other cases despite the same default, and therefore, under *Barr*, the state rule was inadequate. *Id.*, at 416-418 (Blackmun, J., dissenting). The majority rejected this argument, noting that the rule was applied in "the vast majority of cases." *Id.*, at 411, n. 6. The Court noted that even though the failure to clearly state the procedural default in a few cases would permit federal habeas review in those particular cases, it would not "undercut the adequacy" of the rule in general. *Id.*, at 412-413, n. 6.

No doubt in the mid-1960s there was a legitimate concern underlying the apparent distrust of discretionary or less-than-strict rules. That was the suspicion they were being used discriminatorily against federal rights, civil rights organizations, and black criminal defendants. See Glennon, 61 Tenn. L. Rev., at 895 (noting "state court efforts to use their

procedural rules to impede the civil rights movement"). In 2001, that possibility may not have vanished entirely, but it is a faint shadow of what it was in 1964. Today, the cure is far worse than the disease. Flexibility and discretion in the application of default rules should be encouraged, not discouraged.

If the state courts really did exercise discretion so as to discriminate on the basis of race or against fundamental rights, that would be a violation of the Equal Protection Clause by itself. A requirement of truly strict application could only be justified as a kind of conclusive presumption to relieve the claimant of the difficult burden of proving discrimination. Such presumptions should only be used where they produce the correct result most of the time. See *Coleman* v. *Thompson*, 501 U. S., at 737. Presuming discrimination from a lack of iron rigidity in the application of default rules would reach the wrong result nearly all of the time.

In general, then, the requirements of fair notice of the rule and its applicability and a reasonable opportunity to comply accommodate all the important policy considerations. Two supplemental rules should also be recognized to deal with unusual situations. A state rule should not be allowed to defeat the policy of a pertinent federal statute, and actual, invidious discrimination in the application of a state rule independently violates the Equal Protection Clause.

C. Consistency With Statute.

Our proposed rule is also consistent with the exhaustion statute, 28 U. S. C. § 2254(b). As discussed *supra*, at 10, one of the principal purposes of the procedural default rule is to prevent evasion of the exhaustion requirement. Where Congress has made an exception to the exhaustion requirement, there is nothing to evade. Conversely, excusing procedural default where Congress has not excused nonexhaustion would license evasion.

Exhaustion is excused when "circumstances exist that render [State corrective] process ineffective to protect the rights of the [habeas] applicant." § 2254(b)(1)(B)(ii). Failure of the state law to provide fair notice and a reasonable opportunity is such a circumstance. Discretion to excuse defaults is not. Application of the rule in other cases in a less than "strict" manner is not. So long as the path to compliance was marked and unobstructed, the process was not "ineffective." The attorney might have been, but that is a different issue. See *supra*, at 10, n. 4.

A "reasonable opportunity" test for "adequate" state grounds mirrors the statutory exception for the exhaustion rule. It is broad enough to prevent evasion of that rule without blocking claims exempted from the rule. This test is therefore more consistent with the exhaustion-protecting purpose of the procedural default rule than any of the existing alternative tests.

D. Consistency with Precedent.

As we noted earlier, respect for *stare decisis* requires that any restatement of the doctrine of adequate and independent state grounds be as consistent as possible with precedent. No coherent theory could possibly embrace the widely disparate language of the precedents, but it is possible to reconcile all but one of the major cases on their facts. "It is black letter law that the holding of a case is determined by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." *People* v. *Davis*, 7 Cal. 4th 797, 823, 872 P. 2d 591, 608 (1994) (Mosk, J., dissenting) (internal quotation marks omitted). Hence, consistency with the material facts is at least as important as consistency with the language.

First, we can put to one side those cases in which the state rule operates contrary to the policy of a federal statute or regulation. *Davis* v. *Wechsler*, 263 U. S. 22 (1923) belongs in this category. That case involved a suit against a railroad under federal control, and it was brought in violation of a federal executive order prescribing the venue of such suits. See *id.*, at

23; see also *Alabama & Vicksburg R. Co.* v. *Journey*, 257 U. S. 111, 112-114, and n. 1 (1921) (quoting and upholding the order). The purpose of the order was to divest the court of authority to hear the case at all, so the policy considerations supporting respect for state procedure, see *supra*, at 10, diminish to the vanishing point. It would defeat the policy of the order and the statute it implemented to allow a minor misstep in local procedure to subject a federally controlled entity to suit in a court where the case never should have been. Taking a limited view of *Davis*, such as this one, is necessary to reconcile it with *Central Union Tel. Co.* See *supra*, at 6-7.[5] *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294 (1949) can be considered in the same special class. "*Brown* did not involve a pleading problem at all but rather a misconception by the state court as to the governing substantive [federal statutory] law." Hill, *supra*, 65 Colum. L. Rev., at 973.

The federal statute cases aside, we turn to the facts of other cases. The easiest cases are those where the state rule, as applied, is so grossly unfair as to violate due process. *Reece* v. *Georgia*, 350 U. S. 85 (1955) is the exemplar of this group. The indigent defendant's time to challenge the composition of the grand jury expired before counsel was appointed. See *id.*, at 89-90. This is obviously not a reasonable opportunity to state his federal claim, however clearly established the rule might have been.

Cases involving new rules unfairly applied retroactively fit with our proposed requirement of fair notice. These include *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991), *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988) (state case law at the time of the "default" indicated that the procedure defendant used was proper), and *NAACP* v. *Alabama ex rel. Patterson*,

5. An alternative limited view of *Davis* is that the state court's procedural ruling was novel and surprising. See Hill, *supra*, 65 Colum. L. Rev., at 975-976. If Professor Hill is correct, the *Davis* holding on its facts is consistent with our proposed general standard.

357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677-678 (1930) found that the retroactive application of a new rule defaulting the federal claim was a due process violation, so this case fits both categories.

Closely related are those cases where the state rule was clearly established before the "default," but the procedure followed by the federal claimant appeared to be in compliance with the rule as applied up to that time. These include the infamous *Rogers* v. *Alabama*, 192 U. S. 226, 229-230 (1904) (two-page motion stricken as "prolix"), *Sullivan* v. *Little Hunting Park*, discussed *supra*, at 9, and *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). In *Barr*, the state court had held that the objection was "too general to be considered." *Ibid.* Yet, this Court noted, in four other nearly contemporaneous cases, the state court had considered equally general objections and, significantly, had *granted* relief in two of those cases. See *ibid.* We will explain in part II, *infra*, why cases granting relief are more significant than cases reaching the merits but denying relief. In *James* v. *Kentucky*, 466 U. S. 341, 346-347 (1984), the preexisting case law was too confused to give fair notice that defendant had to ask for an "instruction" rather than an "admonition" under the circumstances. In *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the Court noted "a long line" of decisions permitting motions like the defendant's.

Finally, there are the cases where the rule as applied denies a reasonable opportunity to present the federal claim, however well established it may be and however fair it may be in most cases. *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982) illustrates this category. The petition for rehearing in that case was the first opportunity to present the federal question as a practical matter. See *supra*, at 11. Regardless of whether the state rule against raising new issues on petition for rehearing violated due process as applied, the plaintiffs did not have a fair opportunity to present their claim, and hence the state ground was not ade-

quate to bar federal review. In *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 23 (1920), the "coercive means" used by local authorities to illegally tax exempt Indian land had left the Indians with no reasonable opportunity to make the prepayment challenge the state required.

The one case that cannot be reconciled on its facts is *Henry* v. *Mississippi*, 379 U. S. 443 (1965). That case involved a contemporaneous objection rule. *Id.*, at 445-446. The defendant did not object to certain evidence when it was introduced, although he did later. *Ibid.* The actual holding of this confusing case was to remand to the state court with an invitation to adopt the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U. S. 391 (1963) for its own procedural default rule. See *Henry*, *supra*, at 453.[6]

Henry's deficiencies were obvious at the time and were cataloged in Justice Harlan's dissent, *id.*, at 457-465, and Professor Hill's article, *supra*, 65 Colum. L. Rev., at 982-991. Today, there are additional reasons the Court should not be too concerned with *Henry* as precedent. The decision itself is routinely ignored. See *supra*, at 7-8. Most importantly, though, *Henry* is heavily dependent on *Fay* v. *Noia*, which has since been overruled. See Wright, Miller, & Cooper, *supra*, § 4020, at 282, 291. At this point, *Henry* has so little value as precedent that it should not prevent the formulation of a coherent standard.

In summary, a coherent standard of "adequate" state grounds is needed to replace the existing patchwork for state procedural default rules. A requirement of fair notice that the rule exists and applies and a reasonable opportunity to present the claim embraces the important policy considerations and is

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6. The state court declined the invitation, this Court denied certiorari, superfluously adding that the denial was without prejudice to habeas relief, and Henry did obtain habeas relief. See Glennon, 61 Tenn. L. Rev., at 898-899.

consistent with all the major precedents, except for one case that should no longer be considered a valid precedent.

II. State cases which deny defaulted claims on the merits should not be deemed failures to enforce the rule.

Petitioner cites a number of Missouri cases in which the state courts "reached the merits" despite procedural defaults similar to the present case. Brief for Petitioner 31. However, all of these cases denied the appellant's claim. *Ibid.* Under the test proposed by Professor Wright and colleagues and urged in part I of this brief, these cases would be irrelevant. A rule clearly stated in the rules of court and frequently enforced, as described in respondent's brief, provides fair notice of its existence.

Even if the "strictly or regularly followed" test survives, however, there is an important distinction which has so far been overlooked. There is a major difference between skipping past a default issue to *deny* a claim on the merits and excusing a default to *grant* a claim on the merits.

As discussed *supra*, at 13-14, the "strictly or regularly followed" test has its roots in the suspicion of discrimination against disfavored claims or parties. In order to have a disfavored group, there must be a favored group. A court which skips past a default issue to deny the claim on the merits has not done the party much of a favor. Such a decision does open the door to federal review on the merits, but relief remains a very remote possibility. This Court denies all but a tiny fraction of certiorari petitions. See R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 36 (7th ed. 1993). For nearly all civil cases, the state court decision is final. Federal habeas is only available in criminal cases if the petitioner is still in custody when the petition is filed, after exhausting state remedies. See *Maleng* v. *Cook*, 490 U. S. 488, 492 (1989) (*per curiam*). As a practical matter, that excludes virtually all misdemeanors and many lower-grade felonies. About 99% of

federal habeas petitions were denied even before enactment of the present 28 U. S. C. § 2254(d). See V. Flango, Habeas Corpus in State and Federal Courts 61 (National Center for State Courts 1994) (1609 denied in sample of 1626). Today, a state court decision on the merits further reduces the chances of federal habeas relief. See *Williams* v. *Taylor*, 529 U. S. 362, 410-411 (2000). In short, nearly all claimants who are denied relief by state courts will not obtain it from federal courts either, regardless of whether the denial is on procedural grounds or on the merits. Therefore, denying a claimant relief on one ground rather than another is not the kind of discrimination that implicates the federal interests involved here.[7] Cf. *Williams* v. *Georgia*, 349 U. S. 375, 384-387 (1955) (noting similar cases in which relief was granted).

When the responding party contends that a claim is both meritless and defaulted, a court may have sound reasons for denying it on the merits rather than deciding the default issue. When the moving party must clear multiple hurdles to obtain relief, there is generally no requirement to decide the issues in any particular order. Once it is clear that the moving party cannot clear one hurdle, there is usually no hard-and-fast requirement to decide any of the others. For example, *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) expressly endorsed the practice of denying ineffective assistance claims for lack of prejudice without deciding whether counsel's performance was deficient, whenever that is the easier route to decision.

Federal courts recognize an exception to the rule stated above for jurisdiction. Because the legitimacy of the decision of other issues depends on it, jurisdiction must be decided first. *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94-95 (1998). Procedural default issues can claim this priority

7. Imagine an employment discrimination complaint that alleges, "Plaintiff was fired for coming to work late, while similarly situated white employees were fired for leaving early." Not a compelling case.

when they are jurisdictional, such as direct review in this Court of state-court decisions. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992). When the default is not jurisdictional, the order of decision becomes discretionary.

The exhaustion rule is a procedural bar to relief which is not jurisdictional. See *Strickland*, 466 U. S., at 684. Congress has now authorized federal courts to deny but not grant unexhausted claims on the merits. 28 U. S. C. § 2254(b)(2). The reason is efficiency. Issues of exhaustion may be intertwined with issues of default, and the issues may be quite complicated, while habeas claims are often patently meritless on their face. Dismissal of a meritless claim as such may be the more efficient course.

Lambrix v. *Singletary*, 520 U. S. 518 (1997) addressed the order of consideration of procedural default issues. In federal habeas cases, these issues should ordinarily be decided before *Teague*[8] issues and the merits, but not invariably. *Id.*, at 525. "Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Ibid.* The *Lambrix* Court then proceeded to resolve the case on *Teague* grounds without answering the default question. *Ibid.*

There is absolutely no basis in reason or policy why a state rule should be branded as "inadequate" merely because the state courts occasionally take the same path that this Court took in *Lambrix* and that Congress authorized in § 2254(b)(2). Judicial economy in the state appellate courts is no small concern. For example, in the California Courts of Appeal in fiscal year 1997-98 there were 269 contested matters per authorized justice. Judicial Council of Cal., Court Statistics Report 25 (1999). That is 807 cases per three-judge panel per year, a heavy load. Once it becomes obvious that an appellant cannot clear one of

8. *Teague* v. *Lane*, 489 U. S. 288 (1989).

several hurdles in the path to relief, it would be a pointless waste of a scarce resource to decide whether he can clear the others.

Jimmy Swaggart Ministries v. *Board of Equalization of Cal.*, 493 U. S. 378 (1990) illustrates that dismissal of a meritless, defaulted claim on the merits does not render a state rule "inadequate." Swaggart challenged the taxation of religious materials before the Board on First Amendment grounds. *Id.*, at 382-384. The Board's rejection of this claim was affirmed on the merits by the state court and this Court. *Id.*, at 384, 397. In the state court, Swaggart also raised a claim under the Commerce Clause and a claim under the Ninth and Tenth Amendments, even though neither had been raised before the Board. See *Jimmy Swaggart Ministries* v. *State Bd. of Equalization*, 204 Cal. App. 3d 1269, 1290, 1292, n. 19, 250 Cal. Rptr. 891, 905, 907, n. 19 (1988). The state court denied the Commerce Clause claim as procedurally defaulted, *id.*, at 1292, 250 Cal. Rptr., at 906-907, and the Ninth/Tenth Amendment claim on the merits. *Id.*, at 1293, 250 Cal. Rptr., at 907-908.

On appeal, this Court rejected Swaggart's contention that California's procedural rule was "not 'strictly or regularly followed.' " 493 U. S., at 398-399. The rule was "adequate" even though "the Court of Appeal in this case . . . ignored the procedural bar and ruled on the merits of appellant's Ninth and Tenth Amendment arguments [citation] even though those arguments were likewise not raised" in the administrative proceedings. *Ibid.* The apparent reason the state court went to the merits of the latter arguments is that they were "singularly unpersuasive," 204 Cal. App. 3d, at 1293, 250 Cal. Rptr., at 907, and thus decision on the merits was more efficient than pondering the exceptions to California's administrative exhaustion rule. This Court in *Swaggart* brushed off the argument that the state court's choice had somehow rendered the rule inadequate, stating only that "appellant has failed to substantiate any claim that the California courts apply this

exception in *an irregular, arbitrary, or inconsistent manner*." 493 U. S., at 399 (emphasis added).

Swaggart thus tells us that "strictly or regularly followed" means not "irregular, arbitrary, or inconsistent." It further tells us that dismissing a meritless defaulted claim on the merits rather than on the default is not irregular, arbitrary, or inconsistent. A party claiming that a state rule is "inadequate" due to less-than-strict enforcement should have to show, at a minimum, that substantial numbers of other litigants are unfairly favored by having their claims reviewed *and granted* despite an indistinguishable procedural default.

CONCLUSION

To the extent it treated the state court's procedural default ruling as an "adequate" state ground, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.[9]

July, 2001

Respectfully submitted,

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9. *Amicus* CJLF takes no position on the remaining issues in the case.